No.

# In the Supreme Court of the United States

JAMES L. KISOR,

*Petitioner,*

v.

PETER O'ROURKE,
Acting Secretary of Veterans Affairs,

*Respondent.*

**On Petition for a Writ of Certiorari to the Court of Appeals for the Federal Circuit**

## PETITION FOR A WRIT OF CERTIORARI


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## QUESTIONS PRESENTED

*Auer* v. *Robbins*, 519 U.S. 452 (1997), and *Bowles* v. *Seminole Rock & Sand Co.*, 325 U.S. 410 (1945), direct courts to defer to an agency's reasonable interpretation of its own ambiguous regulation. Separately, in *Brown* v. *Gardner*, 513 U.S. 115, 118 (1994), the Court held that "interpretive doubt is to be resolved in the veteran's favor."

Petitioner, a Marine veteran, seeks disability benefits for his service-related post-traumatic stress disorder (PTSD). While the Department of Veterans Affairs (VA) agrees that petitioner suffers from service-related PTSD, it has refused to award him retroactive benefits. The VA's decision turns on the meaning of the term "relevant" as used in 38 C.F.R. § 3.156(c)(1).

Below, the Federal Circuit found that petitioner and the VA both offered reasonable constructions of that term. On that basis alone, the court held that the regulation is ambiguous, and—invoking *Auer*—deferred to the VA's interpretation of its own ambiguous regulation. The questions presented are:

1. Whether the Court should overrule *Auer* and *Seminole Rock*.

2. Alternatively, whether *Auer* deference should yield to a substantive canon of construction.

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## PETITION FOR A WRIT OF CERTIORARI

Petitioner James L. Kisor respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit in this case.

## OPINIONS BELOW

The Federal Circuit panel opinion (App., *infra*, 1a-19a) is reported at 869 F.3d 1360. The decision of the Court of Appeals for Veterans Claims (App., *infra*, 20a-25a) is unreported but available at 2016 WL 337517. The order of the Federal Circuit denying panel rehearing and rehearing en banc and the dissent from such denial (App., *infra*, 44a-54a) are reported at 880 F.3d 1378.

## JURISDICTION

The judgment of the court of appeals was entered on September 7, 2017. A petition for rehearing was denied on January 31, 2018. On April 24, 2018, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including June 29, 2018. See *Kisor* v. *Wilkie*, No. 17a1154. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

## REGULATION INVOLVED

The Department of Veterans Affairs' New and Material Evidence regulation, 38 C.F.R. § 3.156, provides:

> (a) General. A claimant may reopen a finally adjudicated claim by submitting new and material evidence. New evidence means existing evidence not previously submitted to agency decisionmakers. Material evidence means existing evidence that, by itself or

when considered with previous evidence of record, relates to an unestablished fact necessary to substantiate the claim. New and material evidence can be neither cumulative nor redundant of the evidence of record at the time of the last prior final denial of the claim sought to be reopened, and must raise a reasonable possibility of substantiating the claim.

* * *

(c) Service department records.

(1) Notwithstanding any other section in this part, at any time after VA issues a decision on a claim, if VA receives or associates with the claims file relevant official service department records that existed and had not been associated with the claims file when VA first decided the claim, VA will reconsider the claim, notwithstanding paragraph (a) of this section. Such records include, but are not limited to:

(i) Service records that are related to a claimed in-service event, injury, or disease, regardless of whether such records mention the veteran by name, as long as the other requirements of paragraph (c) of this section are met;

* * *

(3) An award made based all or in part on the records identified by paragraph (c)(1) of this section is effective on the date entitlement arose or the date VA received the

previously decided claim, whichever is later, or such other date as may be authorized by the provisions of this part applicable to the previously decided claim.

## STATEMENT

This case is an attractive vehicle for the Court to reconsider a significant and recurring issue at the heart of administrative law: how much deference courts should afford an agency's interpretation of its own ambiguous regulation. That question was the only one decided below, and whether and how *Auer* deference applies is outcome-determinative here.

This case concerns the Department of Veterans Affairs' (VA) construction of its own regulation regarding veteran disability benefits. In particular, the dispute centers on the meaning of the term "relevant." The court of appeals expressly acknowledged that both petitioner and the VA advanced reasonable but irreconcilable constructions of the regulation. On that basis alone, the court found the regulation ambiguous. It then held that *Auer* resolves the case in the VA's favor.

The Court should grant review to overrule *Auer* deference in its entirety. Alternatively, the Court should conclude that *Auer* deference yields to substantive canons of construction—here, the canon that compels courts to construe ambiguities in veterans' benefit laws in the veteran's favor. The Court should then remand to allow the court of appeals to consider, in the first instance, the proper construction of the regulation at issue.

**A. Legal background**

1. The United States, through the VA, provides disability compensation to veterans who suffer injuries resulting from their service. The VA administers a claims-processing system for adjudicating veterans' claims. See, *e.g.*, 38 C.F.R. §§ 3.1 to 3.1010.

After the time for an appeal has elapsed, VA regulations provide two principal mechanisms by which a veteran can seek review of a previously denied claim. First, 38 C.F.R. § 3.156(a) allows a claimant to "reopen" a denial by "submitting new and material evidence." When a veteran obtains relief pursuant to this subsection, the benefits become effective on the date the application to reopen was filed. *Id.* § 3.400(q).

Second, 38 C.F.R. § 3.156(c)(1) authorizes the VA to "reconsider" a previously denied claim in the event that the "VA receives or associates with the claims file relevant official service department records that existed and had not been associated with the claims file when VA first decided the claim." The regulation specifies that "[s]uch records include, but are not limited to" "[s]ervice records that are related to a claimed in-service event, injury, or disease." *Ibid.*

Section 3.156(c)(1) therefore applies when, at the time of the VA's original decision, "relevant" documents existed but the VA failed to consider them. This provision is more favorable to veterans because it provides for a retroactive effective date for any benefits awarded. *Id.* § 3.156(c)(3) (providing that the effective date for any such award is "the date entitlement arose or the date VA received the previously decided claim, whichever is later").

2. This Court has long recognized that "legislation is to be liberally construed for the benefit of those who left private life to serve their country in its hour of great need." *Fishgold* v. *Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 285 (1946) (citing *Boone* v. *Lightner*, 319 U.S. 561, 575 (1943)). Veterans have "been obliged to drop their own affairs and take up the burdens of the nation" (*Boone*, 319 U.S. at 575), "subjecting themselves to the mental and physical hazards as well as the economic and family detriments which are peculiar to military service" (*Johnson* v. *Robison*, 415 U.S. 361, 380 (1974)). Accordingly, "our country has a long standing policy of compensating veterans for their past contributions by providing them with numerous advantages." *Regan* v. *Taxation with Representation*, 461 U.S. 540, 550-551 (1983). For this reason, interpretative ambiguities in veterans' benefit programs are resolved in favor of the beneficiaries. See, *e.g.*, *Brown* v. *Gardner*, 513 U.S. 115, 118 (1994); *Hodge* v. *West*, 155 F.3d 1356, 1361-1362 (Fed. Cir. 1998) (use of canon in construing regulations).

3. In *Bowles* v. *Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945), the Court held that, in the face of an ambiguous regulation, "the ultimate criterion" is "the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation." Subsequently, in *Auer* v. *Robbins*, 519 U.S. 452, 463 (1997), the Court confirmed the broad deference due an agency's interpretation of its own ambiguous regulation.

**B. Factual background and proceedings below.**

Petitioner James Kisor served in the Marines during the Vietnam War. App., *infra*, 2a. In particular, he participated in Operation Harvest Moon. *Id.*

at 3a. During a search operation with his company, he came under attack by sniper fire and mortar rounds. *Ibid.* One major ambush left 13 fellow soldiers dead. *Ibid.*

1. In 1982, petitioner filed a claim with the VA for service-connected disability benefits, asserting that he suffered from post-traumatic stress disorder (PTSD). App., *infra*, 2a.

In support of this claim, petitioner included a letter from a counselor at the Portland Vet Center; the letter indicated that petitioner's symptoms of "depression, suicidal thoughts, and social withdraw[a]l" were "associated with the diagnosis of Post-Traumatic Stress Disorder." App., *infra*, 2a-3a. But a subsequent psychiatric examination suggested that petitioner suffered from "a personality disorder as opposed to PTSD." *Id.* at 3a. Ultimately, the VA denied petitioner's claim for benefits in May 1983, finding insufficient proof that he suffered from PTSD. *Ibid.*

2. In June 2006, petitioner sought review of his previously denied claim. App., *infra*, 4a. The VA granted petitioner relief, finding that he is disabled as a result of service-connected PTSD. *Id.* at 26a-43a.

In requesting relief, petitioner identified materials that existed at the time of the 1983 denial but that had not been associated with his file. App., *infra*, 4a. This included petitioner's Department of Defense Form 214, as well as his Combat History, Expeditions, and Awards Record. *Ibid.* This material "document[ed] his participation in Operation Harvest Moon." *Ibid.*

The VA granted relief pursuant to Section 3.156(a), not Section 3.156(c). App., *infra*, 4a. As a

result, the effective date of petitioner's benefits is June 5, 2006—not the 1983 effective date that he requested. *Id.* at 4a, 6a.

The VA (through the Board of Veterans' Appeals) reached this result because it found that petitioner's Form 214 and the Combat History document did not qualify as "relevant" for purposes of Section 3.156(c)(1). App., *infra*, 42a. The Board reasoned that this material did not "suggest or better yet establish that [petitioner] has PTSD as a current disability." *Ibid.* In the Board's view, records are not "relevant" when they are not "outcome determinative in that they do not manifestly change the outcome of the decision." *Id.* at 42a-43a.

3. The Court of Appeals for Veterans Claims affirmed. App., *infra*, 20a-25a. It restated the Board's conclusion that petitioner's "documents were not outcome determinative," and thus they did not qualify as "relevant" within the meaning of the regulation. *Id.* at 24a.

4. The Federal Circuit affirmed. App., *infra*, 1a-19a. It acknowledged that "the heart of this appeal" is petitioner's "challenge to the VA's interpretation of the term 'relevant.'" *Id.* at 14a-15a.

The Federal Circuit concluded that both parties offered reasonable constructions of the term "relevant" as used in Section 3.156(c)(1). App., *infra*, 17a. Petitioner, the court recognized, argued that material is "relevant" if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more [or less] probable." *Id.* at 16a. In petitioner's view, the documents he provided are relevant because they "speak to the pres-

ence of an in service stressor, one of the requirements of compensation for an alleged service-connected industry." *Ibid.* The VA, by contrast, defended the Board's narrower construction of "relevant." *Id.* at 16a-17a.

The court of appeals held that "a regulation is ambiguous on its face when competing definitions for a disputed term seem reasonable." App., *infra*, 17a (quotation omitted). Here, because "neither party's position" struck the court "as unreasonable," it "conclude[d] that the term 'relevant' in [Section] 3.156(c)(1) is ambiguous." *Ibid.* The court found "[s]ignificant[]" that "[Section] 3.156(c)(1) does not specify whether 'relevant' records are those casting doubt on the agency's prior rating decision, those relating to the veteran's claim more broadly, or some other standard." *Id.* at 15a. "This uncertainty in application suggests that the regulation is ambiguous." *Ibid.*

The court's conclusion that the regulation is ambiguous led it to apply *Auer* deference. Quoting *Auer*, the court explained that "[a]n agency's interpretation of its own regulations is controlling unless plainly erroneous or inconsistent with the regulations being interpreted." App., *infra*, 15a. Because the court viewed Section 3.156(c)(1) as "ambiguous," "the only remaining question is whether the [VA's] interpretation of the regulation is 'plainly erroneous or inconsistent' with the VA's regulatory framework." *Id.* at 17a. Based solely on this deference, the court affirmed the VA's construction of the regulation and, accordingly, affirmed the VA's denial of retroactive benefits. *Id.* at 17a-19a.

5. The court of appeals denied rehearing en banc (App., *infra*, 44a-46a) over a three-judge dissent (*id.* at 47a-54a).

The dissent first noted the repeated calls to abandon *Auer* by Members of this Court, circuit court judges, and academics. App., *infra*, 48a-49a. The dissenting judges nonetheless recognized that the lower courts have "no authority to reconsider *Auer*, of course." *Id.* at 49a.

Instead, the dissenting judges would have narrowed *Auer*, holding it inapplicable in these circumstances. In the dissent's view, the panel erred by failing to properly reconcile *Auer* with "the longstanding 'canon that provisions for benefits to members of the Armed Services are to be construed in the beneficiaries' favor.'" App., *infra*, 50a (quoting *Henderson* v. *Shinseki*, 562 U.S. 428, 441 (2011)). "If only one of these doctrines can prevail in a given case, the pro-veteran canon must overcome *Auer*." *Id.* at 51a. That is because *Auer* applies only when, after using the normal tools of statutory construction, a regulation remains ambiguous. *Ibid.* And "[t]he rule that interpretative doubt is to be resolved in the veteran's favor is one of those rules of statutory construction." *Ibid.* (quotation omitted). Thus, "[a] regulation cannot be so ambiguous as to require *Auer* deference if a pro-veteran interpretation of the regulation is possible." *Ibid.*

## REASONS FOR GRANTING THE PETITION

Members of the Court have repeatedly stressed the need to revisit *Auer*. This case is an appropriate vehicle for doing so: because *Auer* was the sole basis for decision in the court of appeals, this case cleanly

presents the *Auer* question. Given the persistent confusion about *Auer*'s continued vitality manifest in the lower courts, review is warranted.

Alternatively, the Court should grant review to further narrow *Auer*. The lower courts are intractably divided as to the intersection of agency deference doctrines and substantive construction canons. At the very least, the Court should hold—as the dissenting judges below urged—that *Auer* yields to these interpretative tools.

## I. The Court Should Overrule *Auer*.

The Court should definitively resolve whether courts must defer to an agency's interpretation of its own ambiguous regulation. Not only is the question of *Auer* deference important in its own right, but the frequent criticism of *Auer* deference by Members of this Court has caused substantial confusion in the lower courts. Ultimately, the Court should abandon *Auer*. And this case is a suitable vehicle for doing so.

### A. *Auer*'s viability requires resolution.

1. As Justice Thomas recently observed, "[s]everal Members of this Court have said that [*Auer*] merits reconsideration in an appropriate case." *Garco Constr., Inc.* v. *Speer*, 138 S. Ct. 1052, 1053 (2018) (Thomas, J., dissenting from the denial of certiorari). Indeed, "[b]y all accounts, *Seminole Rock* deference is 'on its last gasp.'" *Ibid.* (quoting *United Student Aid Funds, Inc.* v. *Bible*, 136 S. Ct. 1607, 1608 (2016) (Thomas, J., dissenting from the denial of certiorari)).

The criticism of *Auer* has been repeated and sustained. See, *e.g.*, *Perez* v. *Mortgage Bankers*, 135 S. Ct. 1199, 1210-1211 (2015) (Alito, J., concurring in

part and concurring in the judgment) ("The opinions of Justice Scalia and Justice Thomas offer substantial reasons why the *Seminole Rock* doctrine may be incorrect."); *id.* at 1213 (Scalia, J., concurring in the judgment) (urging the Court to "abandon[] *Auer*"); *id.* at 1224 (Thomas, J., concurring in the judgment) ("By my best lights, the entire line of precedent beginning with *Seminole Rock* raises serious constitutional questions and should be reconsidered in an appropriate case."); *Decker* v. *Northwest Envtl. Def. Ctr.*, 568 U.S. 597, 615-616 (2013) (Roberts, C.J., concurring) ("It may be appropriate to reconsider [*Auer*] in an appropriate case.").

More recently, Justice Kennedy observed that existing doctrines of agency deference warrant reconsideration. See *Pereira* v. *Sessions*, No. 17-459 (2018), slip op. 2-3 (Kennedy, J., concurring) ("[I]t seems necessary and appropriate to reconsider, in an appropriate case, the premises that underlie *Chevron*."). See also *Gutierrez-Brizuela* v. *Lynch*, 834 F.3d 1142, 1155 (10th Cir. 2016) (Gorsuch, J., concurring) ("Under any conception of our separation of powers, I would have thought powerful and centralized authorities like today's administrative agencies would have warranted less deference from other branches, not more."). Revisiting *Auer* deference is an appropriate place to begin.

Beyond criticizing *Auer*, the Court has substantially chipped away at it, continuously narrowing its scope. See *Christensen* v. *Harris Cty.*, 529 U.S. 576, 588 (2000) (holding that *Auer* does not apply where the agency's regulation is unambiguous); *Gonzales* v. *Oregon*, 546 U.S. 243, 257 (2006) (holding that *Auer* does not apply where the regulation merely paraphrases statutory language); *Talk Am., Inc.* v. *Mich-*

*igan Bell Tel. Co.*, 564 U.S. 50, 63-64 (2011) (signaling that *Auer* prohibits agencies from issuing a de facto new regulation); *Christopher* v. *SmithKline Beecham Corp.*, 567 U.S. 142, 155-156 (2012) (holding that *Auer* does not apply to an agency's "interpretation of ambiguous regulations [that would] impose potentially massive liability on [the regulated entity] for conduct that occurred well before that interpretation was announced").

2. It is no surprise, then, that widespread confusion persists in the lower courts. While, as here (see, *e.g.*, App., *infra*, 49a), lower courts generally acknowledge that *Auer* remains binding in theory, its uncertain status casts a shadow over the doctrine when invoked. Whatever the Court may ultimately conclude, it is important to bring certainty to this fundamental question of administrative law.

In *Bible* v. *United Student Aid Funds, Inc.*, 807 F.3d 839 (7th Cir. 2015), for example, Judge Easterbrook voted against rehearing en banc because it would not "be a prudent use of this court's resources to have all nine judges consider how *Auer* applies to rehabilitation agreements, when *Auer* may not be long for this world." *Id.* at 841 (Easterbrook, J., concurring in the denial of rehearing en banc). See also *Egan* v. *Delaware River Port Auth.*, 851 F.3d 263, 278 (3d Cir. 2017) (Jordan, J., concurring in the judgment) ("The problems [*Auer* and *Chevron*] create are serious and ought to be fixed."); *Turtle Island Restoration Network* v. *United States Dep't of Commerce*, 878 F.3d 725, 742 n.1 (9th Cir. 2017) (Callahan, J., dissenting in part) ("*Auer*'s continued vitality is a matter of considerable debate.").

When *Auer* is invoked as a rule of decision, courts repeatedly attach an asterisk to opinions, ex-

pressly noting that their reasoning rests on *Auer*'s potentially faulty premise. See, *e.g.*, *Diné Citizens Against Ruining Our Env't* v. *Jewell*, 2018 WL 1940992, at *26 & n.16 (D.N.M. 2018) (noting that "[a]lthough the Court shares Justice Scalia's concerns about *Auer* deference, it is, for the time being, the law of the land, and, as a federal district court, the Court must apply it"); *Occidental Fire & Cas. Co. of N.C.* v. *D'Line Logistics, Inc.*, 2017 WL 6733690, at *4 (N.D. Ill. 2017) ("[T]he court acknowledges that the validity of the *Auer* doctrine has been questioned in recent years."); *Goodson* v. *OS Rest. Servs., LLC*, 2017 WL 1957079, at *6 n.20 (M.D. Fla. 2017) (although Justice Scalia "[p]ersuasively argu[ed] that *Auer* Deference should be abandoned," "this Court remains obligated to defer to administrative pronouncements under *Auer*"); *Eisai, Inc.* v. *United States Food & Drug Admin.*, 134 F. Supp. 3d 384, 394 n.2 (D.D.C. 2015) ("*Auer* has been the target of skepticism in recent years. * * * This Court, however, is bound to follow *Auer* unless and until the Supreme Court modifies the relevant standard.").

It makes little sense for the lower courts to labor under this cloud of uncertainty. The Court should provide concrete guidance.

3. Certiorari is additionally warranted because the doctrine is important. If, as we maintain, *Auer* is wrong, it is imperative that the Court correct it.

The growth of the administrative state has compounded *Auer*'s practical implications. "Because agency rules that comply with specified procedural formalities bind with the force of statutes, *Seminole Rock* has a significant impact on the public's legal rights and obligations." John F. Manning, *Constitutional Structure and Judicial Deference to Agency In-*

*terpretations of Agency Rules*, 96 Colum. L. Rev. 612, 615 (1996). Indeed, the administrative state "wields vast power and touches almost every aspect of daily life." *Free Enter. Fund* v. *Public Co. Accounting Oversight Bd.*, 561 U.S. 477, 499 (2010). See also *INS* v. *Chadha*, 462 U.S. 919, 985-986 (1983) (White, J., dissenting) ("For some time, the sheer amount of law—the substantive rules that regulate private conduct and direct the operation of government—made by the agencies has far outnumbered the law-making engaged in by Congress.").

The *Auer* exemption for interpretive rulemaking "was meant to be more modest in its effects than it is today." *Mortgage Bankers*, 135 S. Ct. at 1211 (Scalia, J.). The literature has shown that agencies are well aware of *Auer* deference and concede that it plays a role in their drafting of regulations. See, *e.g.*, Christopher J. Walker, Chevron *Inside The Regulatory State: An Empirical Assessment*, 83 Fordham L. Rev. 703, 715-716 (2014) (almost 40 percent of rule drafters surveyed indicated that *Auer* specifically played a role in the drafting of regulations).

*Auer* "removes an important affirmative reason for the agency to express itself clearly; since the agency can say what its own regulations mean * * *, the agency bears little, if any, risk of its own opacity or imprecision." Manning, *supra*, at 655. Instead of promoting clarity and precision, *Auer* incentivizes agencies to promulgate vague and broad regulations, which they can later clarify through interpretive rules that are not subject to notice-and-comment procedures. See *ibid.* *Auer* is thus a doctrine that requires this Court's careful review.

### B. Courts should not defer to an agency's interpretation of its own ambiguous regulation.

*Auer* deference is a judicially created tool that guides the construction of agency regulations. It does not rest on any constitutional or legislative footing. The Court should not hesitate to revisit and abandon *Auer* and *Seminole Rock*.

1. *Auer* deference is incompatible with due process, the "fundamental principle in our legal system * * * that laws which regulate persons or entities must give fair notice of conduct that is forbidden or required." *FCC* v. *Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012).

*Auer* deference provides agencies an end-run around the notice-and-comment procedures required by the Administrative Procedure Act (APA), allowing agencies to skirt this fundamental legal constraint. "The [APA] contemplates that courts, not agencies, will authoritatively resolve ambiguities in statutes and regulations." *Mortgage Bankers*, 135 S. Ct. at 1211 (Scalia, J.). But *Auer* deference "frustrates the notice and predictability purposes of rulemaking, and promotes arbitrary government." *Garco*, 138 S. Ct. at 1053 (Thomas, J.) (quoting *Talk Am.*, 564 U.S. at 69 (Scalia, J., concurring)).

Indeed, extending deference to informal agency interpretations "allows the agency to control the extent of its notice-and-comment-free domain." *Mortgage Bankers*, 135 S. Ct. at 1212 (Scalia, J.). The implications are obvious and oft-observed: "To expand this domain, the agency need only write substantive rules more broadly and vaguely, leaving plenty of

gaps to be filled in later, using interpretive rules unchecked by notice and comment." *Ibid.*

As Judge O'Malley observed below, "*Auer* 'encourag[es] agencies to write ambiguous regulations and interpret them later,' which 'defeats the purpose of delegation,' 'undermines the rule of law,' and ultimately allows agencies to circumvent the notice-and-comment rulemaking process." App., *infra*, 49a (quoting Lisa Schultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 N.Y.U. L. Rev. 461, 551-552 (2003)). See also *SmithKline Beecham Corp.*, 567 U.S. at 158 (observing the "risk that agencies will promulgate vague and open-ended regulations that they can later interpret as they see fit, thereby frustrating the notice and predictability purposes of rulemaking").

2. *Auer* also "raises two related constitutional concerns" respecting the separation of powers. *Mortgage Bankers*, 135 S. Ct. at 1217 (Thomas, J.).

*First*, *Auer* "represents a transfer of judicial power to the Executive Branch." *Mortgage Bankers*, 135 S. Ct. at 1217 (Thomas, J.). The Constitution vests the judicial power of the United States with the judiciary, which requires the exercise of "independent judgment." *Ibid.* But, "[b]ecause the agency is * * * not properly constituted to exercise the judicial power under the Constitution, the transfer of interpretive judgment raises serious separation-of-powers concerns." *Id.* at 1219-1220. See also *Garco*, 138 S. Ct. at 1052-1053 (Thomas, J.) ("[*Auer*] undermines 'the judicial check on the political branches' by ceding the courts' authority to independently interpret and apply legal texts.").

As Justice Kennedy recently explained, agency deference "suggests an abdication of the Judiciary's proper role in interpreting federal statutes. The type of reflexive deference exhibited in some of these cases is troubling." *Pereira*, No. 17-459, slip op. 2 (Kennedy, J.). "The proper rules for interpreting [regulations] and determining agency jurisdiction and substantive agency powers should accord with constitutional separation-of-powers principles and the function and province of the Judiciary." *Id.* at 3.

The Federal Circuit here exhibited extraordinary and troubling judicial deference: the mere identification of two plausible, competing interpretations was the sole reason that the agency prevailed. App., *infra*, 17a. The court of appeals wholly abdicated its constitutional mandate to exercise independent judgment; it effectively delegated to the VA its authority to interpret legal texts. This is perhaps the quintessential example of a case in which judicial review has "no more substance at the core than a seedless grape." Ernest Gellhorn & Glen O. Robinson, *Perspectives on Administrative Law*, 75 Colum. L. Rev. 771, 780 (1975).

Not only is *Auer* constitutionally suspect insofar as it strips power from the courts, but it also rests on faulty reasoning. Although agencies may be "better equipped than the courts" to make policy decisions, an agency "is no better equipped to read legal texts." *Garco*, 138 S. Ct. at 1053 (Thomas, J.). See also Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 Admin. L. Rev. 363, 397 (1986).

*Second*, *Auer* "amounts to an erosion of the judicial obligation to serve as a 'check' on the political branches." *Mortgage Bankers*, 135 S. Ct. at 1217 (Thomas, J.). "When courts refuse even to decide

what the best interpretation is under the law, they abandon the judicial check." *Id.* at 1221. That is, "*Auer* deference * * * contravenes one of the great rules of separation of powers: He who writes a law must not adjudge its violation." *Decker*, 568 U.S. at 621 (Scalia, J., concurring in part and dissenting in part). It is dangerous to "eliminat[e] the separation between the entity that creates the law and the one that interprets it." App., *infra*, 49a. In sum, *Auer* "results in an 'accumulation of governmental powers' by allowing the same agency that promulgated a regulation to 'change the meaning' of that regulation 'at [its] discretion.'" *Garco*, 138 S. Ct. at 1052-1053 (Thomas, J.).

3. *Stare decisis* is no reason to retain *Auer* deference. To begin with, *stare decisis* likely does not apply at all, as *Auer* is merely an interpretative tool. *Mortgage Bankers*, 135 S. Ct. at 1214 n.1 (Thomas, J.). Moreover, *stare decisis* has minimal effect when, as here, there is no expectancy interest by the public in a judge-made rule concerning judicial procedure. In *Pearson* v. *Callahan*, 555 U.S. 223, 233 (2009), the Court did not hesitate to revisit the "judge made" rule of sequential decision making in the qualified immunity context, because that "protocol does not affect the way in which parties order their affairs" and thus reversing precedent "would not upset settled expectations on anyone's part." And, as in *Pearson*, "Members of this Court have also voiced criticism" of the underlying rule, as have "[l]ower court judges" bound to apply it. *Id.* at 234-235.

**C. This is a suitable vehicle to revisit *Auer*.**

1. This case cleanly presents *Auer* deference in its most extreme form. To begin with, the sole basis of decision articulated by the court of appeals was

that the presence of two competing, reasonable constructions of the regulation obligated the court to declare the regulation "ambiguous." App., *infra*, 15a-17a. The court merely observed that "neither party's position strikes us as unreasonable." *Id.* at 17a. That is all it takes for *Auer* to apply: a "regulation is ambiguous on its face" whenever "competing definitions for a disputed term seem reasonable." *Ibid.* (quotation omitted). The panel did not offer an ounce of independent analysis as to the interpretative dispute. See *ibid.*

The decision below thus hangs entirely on the *Auer* doctrine. There is no factual dispute, nor did the panel identify any alternative ground for its holding.

This case is therefore unlike other recent petitions addressing *Auer*. In *United Student Aid Funds*, for example, the regulation was likely unambiguous. See Br. in Opp'n at 14-16, *United Student Aid Funds, Inc.* v. *Bible*, 136 S. Ct. 1607 (2016) (No. 15-861). See also Br. in Opp'n at 16, *Flytenow, Inc.* v. *FAA*, 137 S. Ct. 618 (2017) (No. 16-14) ("[E]ven without such deference, [the court] had no difficulty upholding the FAA's interpretation of its regulations."). Here, however, the court of appeals' decision rests on an express finding of ambiguity.

What is more, the VA is a *party* to this litigation; in the Federal Circuit's view, the VA's *own* position—formulated during the adjudication of petitioner's claim—is decisive. The Court should be especially skeptical of *Auer* deference when an agency invokes it to resolve an adversarial proceeding in its own favor. *Auer* certainly should have no effect when the interpretation at issue advances the agency's fiscal self-interest.

Nor does this case possess any sort of vehicle defect that would preclude the Court from reaching the heart of *Auer*. In *Garco Construction*, the government opposed review in part because the regulation being construed was not itself the product of notice-and-comment procedures—and thus it did not pose a core *Auer* question. See, *e.g.*, Br. in Opp'n at 16-17, *Garco Constr. Co.* v. *Speer*, 138 S. Ct. 1052 (2017) (No. 17-225). The regulation here, 38 C.F.R. § 3.156(c)(1), was duly adopted pursuant to the APA, and thus all the concerns about an agency end-run around notice and comment apply.

There has been no policy change, moreover, that would render the underlying issue moot or unimportant. See *Garco* Br. in Opp'n at 18 (the outcome of the dispute would have "no ongoing effect on the Air Force's authority"). See also Br. in Opp'n at 19-20, *Hyosung D&P Co.* v. *United States*, 137 S. Ct. 1325 (2017) (No. 16-141). And this case does not involve any special consideration—like deference to questions of military affairs—that would complicate review of *Auer*. Cf. *Garco*, 138 S. Ct. at 1053 (Thomas, J.) (acknowledging that "the military receives substantial deference on matters of policy").

2. Review is also warranted because, under de novo review of the regulation, petitioner is substantially likely to prevail. To be sure, the proper course is for the Court to resolve the sole legal issue that governed below—*Auer* deference—and then remand for application of the proper standard to the particulars of this case. When the Court "reverse[s] on a threshold question," it "typically remand[s] for resolution of any claims the lower courts' error prevented them from addressing." *Zivotofsky ex rel. Zivotofsky* v. *Clinton*, 566 U.S. 189, 201 (2012). See also *Fitz-*

*gerald* v. *Barnstable Sch. Comm.*, 555 U.S. 246, 260 (2009) ("Ordinarily, 'we do not decide in the first instance issues not decided below.'"). It nonetheless bears mention that petitioner is very likely to prevail under the proper standard.

In petitioner's view, material is "relevant" for purposes of Section 3.156(c)(1) if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more [or less] probable." App., *infra*, 13a. See also *id.* at 16a. That is to say, documents are "relevant" if they matter to the VA's decision whether to grant benefits. Because the documents at issue here "speak to the presence of an in service stressor, one of the requirements of compensation for an alleged service-connected industry," they are "relevant" as petitioner construes the regulation. *Id.* at 16a.

The VA, by contrast, advances a far narrower construction of "relevant." In the VA's view, the issue is not whether the documents are relevant to the VA's overall decision whether to grant a veteran benefits; instead, documents are "relevant" only if they directly bear on what was "in issue" during the VA's earlier decision to deny benefits. App., *infra*, 16a-17a.

For multiple reasons, petitioner offers the better construction. *First*, the regulation itself identifies that "relevant official service department records" include "records that are related to a claimed in-service event" or "injury." 38 C.F.R. § 3.156(c)(1). The materials at issue were relied on by the VA precisely because they are "related to a claimed in-service event" or "injury." The VA's narrower definition of "relevant" is therefore inconsistent with the text of Section 3.156(c)(1).

*Second*, the VA's construction of the term "relevant" renders it indistinguishable from "material," which Section 3.156(a) expressly defines as "evidence that, by itself or when considered with previous evidence of record, relates to an unestablished fact necessary to substantiate the claim." If the VA had actually meant for Section 3.156(c)(1) to apply only to "material" evidence, it would have used that word.

*Third*, "relevant" is a legal term of art. Federal Rule of Evidence 401, for example, defines "relevant" as "any tendency to make a fact more or less probable" when the "fact is of consequence in determining the action." Whether petitioner's PTSD is attributable to an in-service stressor is undeniably a fact "of consequence in determining the action." Thus, the documents petitioner provided are "relevant" for purposes of these proceedings.

*Fourth*, to the extent that any doubt remains as to the proper construction of the veteran's disability program, ambiguities must be construed in petitioner's favor. The Court has "long applied 'the canon that provisions for benefits to members of the Armed Services are to be construed in the beneficiaries' favor.'" *Henderson* v. *Shinseki*, 562 U.S. 428, 441 (2011) (quoting *King* v. *St. Vincent's Hosp.*, 502 U.S. 215, 220 n.9 (1991)). Indeed, the "solicitude of Congress for veterans is of long standing," which effectively "place[s] a thumb on the scale in the veteran's favor in the course of administrative and judicial review of VA decisions." *Id.* at 440 (quotation omitted). To the extent that there are multiple reasonable ways to construe "relevant" as used in Section 3.156(c)(1)—the conclusion reached below (App., *infra*, 15a-17a)—courts are obligated to choose the construction that favors veterans.

## II. Alternatively, The Court Should Hold That *Auer* Deference Yields To Substantive Interpretative Canons.

This last point—the intersection of a substantive canon of construction and *Auer* deference—is an issue worthy of review in its own right. The federal courts of appeals are deeply divided on which interpretative tool comes first: a substantive canon of construction or deference to an agency's interpretation. The Court should grant review of this question, and, if it retains *Auer*, it should hold that deference to an agency is proper only after all other applicable canons have failed to resolve latent ambiguities.

### A. The circuits are divided regarding the intersection of agency deference and substantive construction canons.

As Judge O'Malley's opinion dissenting from the denial of rehearing explained below, the question of whether a substantive canon of construction comes before or after agency deference doctrines is an important issue that has divided the circuits. App., *infra*, 50a-52a ("In a case like this one, where the agency's interpretation of an ambiguous regulation and a more veteran-friendly interpretation are in conflict, it is unclear from [this Court's] precedent which interpretation should control."). Indeed, courts have acknowledged the circuit "split on which canon controls" in these circumstances. *Rancheria* v. *Hargan*, 296 F. Supp. 3d 256, 266 (D.D.C. 2017).

1. Several courts of appeals hold that substantive canons of construction should be applied *prior* to resorting to agency deference.

As the dissent below identified (App., *infra*, 52a), the D.C. Circuit holds that substantive interpreta-

tive tools trump agency deference doctrines. In the context of the pro-Indian canon,[1] the D.C. Circuit has held that agency deference—in particular, "*Chevron* deference"—"is not applicable." *Cobell* v. *Norton*, 240 F.3d 1081, 1101 (D.C. Cir. 2001). The pro-Indian canon creates a mechanism to resolve ambiguities, and agencies are not exempt from that doctrine. See *ibid.*

The D.C. Circuit has applied this law with some frequency. See, *e.g.*, *Cobell* v. *Kempthorne*, 455 F.3d 301, 304 (D.C. Cir. 2006) (holding that the "normally-applicable [*Chevron*] deference was trumped by the requirement" to construe statutes "liberally in favor of the Indians"); *Massachusetts* v. *DOT*, 93 F.3d 890, 893 (D.C. Cir. 1996) ("As a result of this presumption, we have rejected agency interpretations of statutes that may have been reasonable in other contexts because the agency interpretation would not favor the Indians."); *Albuquerque Indian Rights* v. *Lujan*, 930 F.2d 49, 59 (D.C. Cir. 1991) ("Based on the special strength of this canon, we then declined to defer to DOI's interpretation of the governing statute, which had not followed the canon."); *Muscogee (Creek) Nation* v. *Hodel*, 851 F.2d 1439, 1445 n.8 (D.C. Cir. 1988) (holding that, because of the pro-Indian canon, "while we have given careful consideration to Interior's interpretation of the [statute], we do not defer to it").

Likewise, the D.C. Circuit applies the rule of lenity prior to agency deference. Because "the law of

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[1] The pro-Indian canon is closely parallel to the pro-veteran canon. Both are canons of "special strength." Compare App., *infra*, 52a, with *Albuquerque Indian Rights* v. *Lujan*, 930 F.2d 49, 59 (D.C. Cir. 1991) (the canon of construction favoring Native Americans is one of "special strength").

crimes must be clear," "[t]here is less room in a statute's regime for flexibility, a characteristic so familiar to us on this court in the interpretation of statutes entrusted to agencies for administration." *United States* v. *McGoff*, 831 F.2d 1071, 1077 (D.C. Cir. 1987). In the criminal context, therefore, a court is "far outside *Chevron* territory." *Ibid.*

The D.C. Circuit's reconciliation of agency deference and substantive construction canons necessarily governs in *Auer* cases, too. In *Maniilaq Ass'n* v. *Burwell*, 170 F. Supp. 3d 243 (D.D.C. 2016), the court observed that, in the D.C. Circuit, "courts 'typically do not apply full *Chevron* deference to an agency interpretation of an ambiguous statutory provision involving Indian affairs.'" *Id.* at 248 n.4 (quoting *California Valley Miwok Tribe* v. *United States*, 515 F.3d 1262, 1266 n.7 (D.C. Cir. 2008)). On this basis, the court concluded that "[t]here is good reason to believe that the canon trumps *Auer* deference as well." *Ibid.* The court thus applied the pro-Indian canon, rather than *Auer* deference. *Id.* at 247-248.

The **Tenth Circuit** has reached the same result. Expressly following D.C. Circuit precedent, the Tenth Circuit holds that "the canon of construction favoring Native Americans controls over the more general rule of deference to agency interpretations of ambiguous statutes." *Ramah Navajo Chapter* v. *Lujan*, 112 F.3d 1455, 1462 (10th Cir. 1997). As a result, "the canon of construction favoring Native Americans necessarily constrains the possible number of reasonable ways to read an ambiguity in the statute." *Ibid.* (alteration and quotation omitted).

The Tenth Circuit's holdings on this point are clear and unambiguous: the pro-Indian "canon of construction controls over more general rules of def-

erence to an agency's interpretation of an ambiguous statute." *Southern Ute Indian Tribe* v. *Sebelius*, 657 F.3d 1071, 1078 (10th Cir. 2011).

As in the D.C. Circuit, courts have concluded that the Tenth Circuit's holding applies equally in the *Auer* context. That is, "Tenth Circuit precedent indicates that courts should not" "apply *Auer* deference to an agency's interpretation of the [statute's] promulgating regulations." *Navajo Health Found.-Sage Mem'l Hosp., Inc.* v. *Burwell*, 100 F. Supp. 3d 1122, 1175 (D.N.M. 2015). While "*Chevron* deference is distinct from *Auer* deference, the Tenth Circuit's rationale for not applying *Chevron* deference to * * * statutory provisions applies with equal force to *Auer* deference." *Ibid.*

2. Other circuits, however, disagree. To begin with, the **Federal Circuit** below applied *Auer*—not the pro-veteran canon—to resolve ambiguity. App., *infra*, 17a. Indeed, the three-judge dissent highlighted that this "case presents an ideal vehicle * * * to consider the reach of *Auer* deference when it comes into conflict with the pro-veteran canon of construction." *Id.* at 54a.

The **Ninth Circuit** likewise holds, in the context of the pro-Indian canon, that agency deference doctrines apply first. The Ninth Circuit has "declined to apply" the pro-Indian canon "in light of competing deference given to an agency charged with the statute's administration." *Haynes* v. *United States*, 891 F.2d 235, 239 (9th Cir. 1989). See also *Seldovia Native Ass'n, Inc.* v. *Lujan*, 904 F.2d 1335, 1342 (9th Cir. 1990) (observing that the court "recently rejected the application" of the pro-Indian canon in the context of agency deference).

Similarly, the Ninth Circuit concludes that agency deference applies prior to the rule of lenity. See *Pacheco-Camacho* v. *Hood*, 272 F.3d 1266, 1272 (9th Cir. 2001) ("To the extent that there is any ambiguity * * * , the [agency] has resolved it through a reasonable interpretation, and the rule of lenity does not apply.").

The **Second Circuit** and the **Fourth Circuit** have reached the same result in the lenity context. See *Oppedisano* v. *Holder*, 769 F.3d 147, 153 (2d Cir. 2014) (holding that the rule of lenity "does not trump *Chevron*'s requirement of deference to reasonable interpretations by administrative agencies of statutes for which they are responsible"); *Yi* v. *Federal Bureau of Prisons*, 412 F.3d 526, 535 (4th Cir. 2005) ("Rather than apply a presumption of lenity to resolve the ambiguity, *Chevron* requires that we *defer* to the agency's reasonable construction of the statute.").

**B. If *Auer* is maintained, the Court should require agencies to apply the substantive construction canons.**

The Court has repeatedly narrowed *Auer* (see pp. 11-12, *supra*) where there exist "strong reasons for withholding the deference that *Auer* generally requires." *SmithKline Beecham Corp.*, 567 U.S. at 155. If *Auer* remains in some fashion, the Court should hold it inapplicable in the face of a substantive canon of construction.

In construing the statutes and regulations that they administer, agencies must use the ordinary tools of construction. *Auer* applies only if, after using those tools, the regulation remains ambiguous. See *Auer*, 519 U.S. at 462-463. There is no basis in law to

exempt agencies from applying substantive canons of construction—such as the veteran's solicitude canon—that govern everywhere else. It would be bizarre indeed if private litigants and courts were obligated to interpret regulations in this manner, but agencies were free to disregard these fundamental principles. To the extent *Auer* remains, it should yield to all other applicable rules of construction.

In his concurrence in *Crandon* v. *United States*, 494 U.S. 152, 177-178 (1990), Justice Scalia explained that agency deference should play little role in the construction of criminal laws, as that would "replac[e] the doctrine of lenity with a doctrine of severity." Rather, as Justice Scalia saw it, the rule of lenity—like all substantive construction canons—should take hold prior to agency deference.

As Judge O'Malley noted below in her dissent, "[w]hatever the logic behind continued adherence to the doctrine espoused in *Auer*—and I see little—there is no logic to its application to regulations promulgated pursuant to statutory schemes that are to be applied liberally for the very benefit of those regulated." App., *infra*, 48a. Rather, "[w]hen these two doctrines pull in different directions, it is *Auer* deference that must give way." *Ibid.*

This conclusion, moreover, would resolve this case. As Judge O'Malley observed, "[a] regulation cannot be so ambiguous as to require *Auer* deference if a pro-veteran interpretation of the regulation is possible." App., *infra*, 51a.

## CONCLUSION

The Court should grant the petition for a writ of certiorari.

Respectfully submitted.

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JUNE 2018

# APPENDICES

# APPENDIX A

## UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

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**JAMES L. KISOR,**
*Claimant-Appellant*

**v.**

**DAVID J. SHULKIN, SECRETARY OF VETERANS AFFAIRS,**
*Respondent-Appellee*

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2016-1929

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Appeal from the United States Court of Appeals for Veterans Claims in No. 14-2811, Judge Alan G. Lance, Sr.

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Decided: September 7, 2017

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KENNETH M. CARPENTER, Law Offices of Carpenter Chartered, Topeka, KS, argued for claimant-appellant.

IGOR HELMAN, Commercial Litigation Branch, Civil Division, United States Department of Justice, Washington, DC, argued for respondent-appellee. Also represented by BENJAMIN C. MIZER, ROBERT E.

KIRSCHMAN, JR., MARTIN F. HOCKEY, JR.; Y. KEN LEE, SAMANTHA ANN SYVERSON, United States Department of Veterans Affairs, Washington, DC.

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Before REYNA, SCHALL, and WALLACH, *Circuit Judges*.

SCHALL, *Circuit Judge*.

James L. Kisor, a veteran, appeals the January 27, 2016 decision of the United States Court of Appeals for Veterans Claims ("Veterans Court") in *Kisor v. McDonald*, No. 14-2811, 2016 WL 337517 (Vet. App. Jan. 27, 2016). In that decision, the Veterans Court affirmed the April 29, 2014 decision of the Board of Veterans' Appeals ("Board") denying Mr. Kisor entitlement to an effective date earlier than June 5, 2006, for the grant of service connection for his post-traumatic stress disorder ("PTSD"). *Kisor*, 2016 WL 337517, at *1. We affirm.

## BACKGROUND

### I.

The pertinent facts are as follows: Mr. Kisor served on active duty in the Marine Corps from 1962 to 1966. *Id.* In December of 1982, he filed an initial claim for disability compensation benefits for PTSD with the Department of Veterans Affairs ("VA") Regional Office ("RO") in Portland, Oregon. *Id.* Subsequently, in connection with that claim, the RO received a February 1983 letter from David E. Collier, a counselor at the Portland Vet Center. J.A. 17. In his letter, Mr. Collier stated: "[I]nvolvement in group and individual counseling identified . . . concerns that Mr. Kisor had towards depression, suicidal

thoughts, and social withdraw[a]l. This symptomatic pattern has been associated with the diagnosis of Post-Traumatic Stress Disorder (DSM III 309.81)." *Id.*

In March of 1983, the RO obtained a psychiatric examination for Mr. Kisor. In his report, the examiner noted that Mr. Kisor had served in Vietnam; that he had participated in "Operation Harvest Moon"[1]; that he was on a search operation when his company came under attack; that he reported several contacts with snipers and occasional mortar rounds fired into his base of operation; and that he "was involved in one major ambush which resulted in 13 deaths in a large company." J.A. 19–20. The examiner did not diagnose Mr. Kisor as suffering from PTSD, however. Rather, it was the examiner's "distinct impression" that Mr. Kisor suffered from "a personality disorder as opposed to PTSD." J.A. 21. The examiner diagnosed Mr. Kisor with intermittent explosive disorder and atypical personality disorder. *Id.* Such conditions cannot be a basis for service connection. *See* 38 C.F.R. § 4.127.[2] Given the lack of a current diagnosis of PTSD, the RO denied Mr. Kisor's claim in May of 1983. J.A. 23. The RO decision became final after Mr. Kisor initiated, but then failed to perfect, an appeal. *Kisor*, 2016 WL 337517, at *1.

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[1] Operation Harvest Moon was a military engagement against the Viet Cong during the Vietnam War. *See, e.g.*, J.A. 20, 95, 101.

[2] Under § 4.127, "[i]ntellectual disability (intellectual developmental disorder) and personality disorders are not diseases or injuries for compensation purposes, and . . . disability resulting from them may not be service-connected."

II.

On June 5, 2006, Mr. Kisor submitted a request to reopen his previously denied claim for service connection for PTSD. J.A. 25. While his request was pending, he presented evidence to the RO. This evidence included a July 20, 2007 report of a psychiatric evaluation diagnosing PTSD. *See* J.A. 100–11. It also included a copy of Mr. Kisor's Department of Defense Form 214, a Combat History, Expeditions, and Awards Record documenting his participation in Operation Harvest Moon, and a copy of the February 1983 letter from the Portland Vet Center. *See* J.A. 16–17, 27–28. In September of 2007, a VA examiner diagnosed Mr. Kisor with PTSD. J.A. 115. The RO subsequently made a Formal Finding of Information Required to Document the Claimed Stressor based on Mr. Kisor's statements, his service medical records (which verified his service in Vietnam with the 2nd Battalion, 7th Marines), and a daily log from his unit, which detailed the combat events Mr. Kisor had described in connection with his claim. J.A. 30.

In due course, the RO issued a rating decision reopening Mr. Kisor's previously denied claim. The decision granted Mr. Kisor service connection for PTSD and assigned a 50 percent disability rating, effective June 5, 2006.[3] *Kisor*, 2016 WL 337517, at *1.

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[3] Pursuant to 38 C.F.R. § 3.156(a), a claim may be reopened on the submission of "new and material" evidence. The regulation defines "new" evidence as "existing evidence not previously submitted to agency decisionmakers." 38 C.F.R. § 3.156(a). It defines "material" evidence as "existing evidence that, by itself or when considered with previous evidence of record, relates to an unestablished fact necessary to substantiate the claim." *Id.* If a previously denied claim (such as Mr. Kisor's PTSD claim) is later reopened and granted based on the submission of new and

According to the decision, the rating was based upon evidence that included the July 2007 psychiatric evaluation report diagnosing PTSD, the September 2007 VA examination, and the Formal Finding of Information Required to Document the Claimed Stressor. J.A. 32–33. The RO explained that service connection was warranted because the VA examination showed that Mr. Kisor was diagnosed with PTSD due to experiences that occurred in Vietnam and because the record showed that he was "a combat veteran (Combat Action Ribbon recipient)." J.A. 33.

In November of 2007, Mr. Kisor filed a Notice of Disagreement. In it, he challenged both the 50 percent disability rating and the effective date assigned by the RO. *Kisor*, 2016 WL 337517, at *1. Subsequently, in March of 2009, the RO issued a decision increasing Mr. Kisor's schedular rating to 70 percent. In addition, the RO granted a 100 percent rating on an extraschedular basis, effective June 5, 2006.[4] J.A. 41–45. In January of 2010, the RO issued a State-

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material evidence, the effective date of benefits is the date that the claimant filed the application to reopen or the date entitlement arose, whichever is later. *See* 38 U.S.C. § 5110(a); 38 C.F.R. § 3.400(q)(2). In this case, under the new and material evidence approach, the effective date for benefits would be June 5, 2006—the date of Mr. Kisor's request to reopen his claim. J.A. 25.

[4] The VA evaluates a veteran's disability level by using diagnostic codes in the rating schedule of title 38 of the Code of Federal Regulations. *See* 38 C.F.R. § 3.321(a); *see generally* 38 C.F.R. §§ 4.40–4.150 (rating schedule). The evaluation reflects a veteran's base, "schedular" rating. *See Thun v. Peake*, 22 Vet. App. 111, 114 (2008). In exceptional cases, where the schedular rating is inadequate, the veteran is eligible for a higher, "extraschedular" disability rating. *See* 38 C.F.R. § 3.321(b)(1); *Thun*, 22 Vet. App. at 114–15.

ment of the Case denying entitlement to an earlier effective date for the grant of service connection for PTSD. *See* J.A. 53–65.

III.

Mr. Kisor appealed to the Board. Before the Board, he contended that he was entitled to an effective date earlier than June 5, 2006 for the grant of service connection for PTSD. Specifically, he argued that the proper effective date for his claim was the date of his initial claim for disability compensation that was denied in May of 1983. *See* J.A. 47–48. In support, Mr. Kisor alleged clear and unmistakable error (CUE) in the May 1983 rating decision; he also alleged various duty-to-assist failures on the part of the VA. *See* J.A. 47–48, 84–87.

The Board rejected these arguments. It ruled that the duty to assist had not been violated, that Mr. Kisor had failed to establish CUE, and that the RO's May 1983 rating decision became final when Mr. Kisor failed to perfect his appeal of the decision. *See* J.A. 85–88. The Board found no reason to upset the finality of the May 1983 decision because "[t]he remedy available to the Veteran was to appeal," but he did not do so. J.A. 86.

The Board, however, raised "another way to challenge the May 1983 rating decision" that had not been advanced by Mr. Kisor. J.A. 88. That way turned on whether Mr. Kisor was eligible for an earlier effective date for his service connection under the regulation set forth at 38 C.F.R. § 3.156(c). In contrast to 38 C.F.R. § 3.156(a), which only permits claims to be reopened on the submission of "new and material" evidence, § 3.156(c) allows claims to be reconsidered if certain conditions are met. *See*

38 C.F.R. § 3.156(c)(1) (noting that § 3.156(c) applies "notwithstanding paragraph (a)").

Subsection 3.156(c) includes two parts relevant to this appeal. *First*, paragraph (c)(1) defines the circumstances under which the VA must reconsider a veteran's claim for benefits based on newly-associated service department records:

> [A]t any time after VA issues a decision on a claim, if VA receives or associates with the claims file relevant official service department records that existed and had not been associated with the claims file when VA first decided the claim, VA will reconsider the claim . . . .

38 C.F.R. § 3.156(c)(1). *Second*, paragraph (c)(3) establishes the effective date for any benefits granted as a result of reconsideration under paragraph (c)(1):

> An award made based all or in part on the records identified by paragraph (c)(1) of this section is effective on the date entitlement arose or the date the VA received the previously decided claim, whichever is later, . . . .

38 C.F.R. § 3.156(c)(3).

Section 3.156(c) thus provides for an effective date for claims that are reconsidered that is different from the effective date for claims that are reopened. As we pointed out in *Blubaugh v. McDonald*, "[i]n contrast to the general rule, § 3.156(c) requires the VA to reconsider a veteran's claim when relevant service department records are newly associated with the veteran's claims file, whether or not they are 'new and material' under § 3.156(a)." 773 F.3d 1310, 1313 (Fed. Cir. 2014) (citing New and Material

Evidence, 70 Fed. Reg. 35,388, 35,388 (June 20, 2005)). "In other words," we observed, "§ 3.156(c) serves to place a veteran in the position he would have been in had the VA considered the relevant service department record before the disposition of his earlier claim." *Id.*

Applying the regulation, the Board considered whether the material Mr. Kisor submitted in connection with his June 2006 request to reopen warranted reconsideration of his claim.[5] If it did, then Mr. Kisor would have been eligible for an effective date of December of 1982 for his disability benefits, "the date the VA received the previously decided claim." 38 C.F.R. § 3.156(c)(3).

After reviewing the evidence, the Board denied Mr. Kisor entitlement to an effective date earlier than June 5, 2006. J.A. 91. The Board found that the VA did receive service department records documenting Mr. Kisor's participation in Operation Harvest Moon after the May 1983 rating decision. J.A. 89–90. The Board concluded, though, that the records were not "relevant" for purposes of § 3.156(c)(1). J.A. 90. The Board explained that the 1983 rating decision denied service connection because there was no diagnosis of PTSD, and because service connection can be granted only if there is a current disability.[6] *Id.*

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[5] The newly-submitted material related to Mr. Kisor's Marine Corps service in Vietnam, including his participation in Operation Harvest Moon. J.A. 94–97. These records had not been part of Mr. Kisor's claims file in May of 1983 when the RO first denied his claim.

[6] Service connection for PTSD requires (1) a medical diagnosis of the condition, (2) a medically established link between current symptoms and an in-service stressor, and (3) credible evidence showing that the in-service stressor occurred. *See*

(citing *Brammer v. Derwinski*, 3 Vet. App. 223 (1992)). The Board stated that "relevant evidence, whether service department records or otherwise, received after the rating decision would suggest or better yet establish that the Veteran has PTSD as a current disability." *Id.* The Board noted that Mr. Kisor's "service personnel records and the daily log skip this antecedent to address the next service connection requirement of a traumatic event during service." *Id.* Finally, the Board concluded with the observation that the records at issue were not "outcome determinative" and "not relevant to the decision in May 1983 because the basis of the denial was that a diagnosis of PTSD was not warranted, not a dispute as to whether or not the Veteran engaged in combat with the enemy during service." J.A. 90–91.

Mr. Kisor appealed the Board's decision to the Veterans Court. There, he argued that the Board had "failed to consider and apply the provisions of 38 C.F.R. § 3.156(c)."[7] *Kisor*, 2016 WL 337517, at *1. The court rejected the argument. The court noted that Mr. Kisor did not argue that the service department records presented after the May 1983 rating decision contained a diagnosis of PTSD, the ab-

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38 C.F.R. § 3.304(f); *Golz v. Shinseki*, 590 F.3d 1317, 1321–22 (Fed. Cir. 2010).

[7] Mr. Kisor's appeal to the Veterans Court focused solely on the Board's purported misinterpretation of 38 C.F.R. § 3.156(c)(1). Mr. Kisor did not pursue his CUE or duty-to-assist claims before the Veterans Court, and he has not raised them before us. We therefore consider them waived. *See, e.g.*, *Emenaker v. Peake*, 551 F.3d 1332, 1337 (Fed. Cir. 2008) (considering an argument waived on appeal when it was not timely presented to the Veterans Court); *SmithKline Beecham Corp. v. Apotex Corp.*, 439 F.3d 1312, 1319 (Fed. Cir. 2006) ("[A]rguments not raised in the opening brief are waived.").

sence of such a diagnosis having been the basis for the RO's 1983 rating decision. *Id.* at *2. The Veterans Court stated that it was "not persuaded that the Board incorrectly applied § 3.156." *Id.* at *3. Accordingly, it held that Mr. Kisor had "failed to demonstrate error in the Board's findings that an effective date earlier than June 5, 2006, is not warranted for the grant of service connection for PTSD." *Id.* Mr. Kisor timely appealed the Veterans Court's decision.

## DISCUSSION

### I.

Section 7292 of title 38 of the United States Code grants us jurisdiction over decisions of the Veterans Court. Section 7292 provides that we "'shall decide all relevant questions of law' arising from appeals from decisions of the Veterans Court, but, '[e]xcept to the extent that an appeal . . . presents a constitutional issue, [we] may not review (A) a challenge to a factual determination, or (B) a challenge to a law or regulation as applied to the facts of a particular case.'" *Sneed v. McDonald*, 819 F.3d 1347, 1350–51 (Fed. Cir. 2016) (quoting 38 U.S.C. § 7292(d)(1)–(2)).

As discussed more fully below, on appeal Mr. Kisor argues that the Veterans Court misinterpreted 38 C.F.R. § 3.156(c)(1). An argument that the Veterans Court misinterpreted a regulation falls within our jurisdiction. *See* 38 U.S.C. § 7292(c) (granting this court "exclusive jurisdiction to review and decide any challenge to the validity of any . . . regulation or any interpretation thereof" by the Veterans Court); *Spicer v. Shinseki*, 752 F.3d 1367, 1369 (Fed. Cir. 2014); *Githens v. Shinseki*, 676 F.3d 1368, 1371 (Fed. Cir. 2012).

We must set aside an interpretation of a regulation that we find to be:

> (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
>
> (B) contrary to constitutional right, power, privilege, or immunity;
>
> (C) in excess of statutory jurisdiction, authority, or limitations, or in violation of a statutory right; or
>
> (D) without observance of procedure required by law.

38 U.S.C. § 7292(d)(1)(A)–(D); *Sursely v. Peake*, 551 F.3d 1351, 1354 (Fed. Cir. 2009).

II.

Mr. Kisor contends that, in affirming the decision of the Board, the Veterans Court erred in its interpretation of 38 C.F.R. § 3.156(c)(1).[8] As seen, the

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[8] Mr. Kisor never argued before the Veterans Court that the Board misinterpreted the term "relevant" in § 3.156(c). *See* J.A. 117–29 (Opening Brief), 155–65 (Reply Brief). Instead, as noted, he argued that the Board "failed to consider and apply the provisions of . . . § 3.156(c)." J.A. 123; *see* J.A. 128 (raising "a question of regulatory interpretation" regarding whether "the use of the phrase 'that existed' [in § 3.156(c)(1)] mean[s] that the relevant official service department records must have existed when the VA first decided the claim"). Mr. Kisor's failure to challenge the Board's interpretation of "relevant" before the Veterans Court could constitute waiver. *See Emenaker*, 551 F.3d at 1337 ("In order to present a legal issue in a veteran's appeal, the appellant ordinarily must raise the issue properly before the Veterans Court . . . ."). The Board did determine, however, that the "service department records received . . . were not relevant." J.A. 79; *see* J.A. 91 (stating that "those docu-

regulation provides that the VA will "reconsider" a claim if it "receives or associates with the claims file *relevant* official service department records that existed and had not been associated with the claims file when VA first decided the claim." 38 C.F.R. § 3.156(c)(1) (emphasis added). Mr. Kisor states that the VA should have reconsidered his claim under the regulation and thus afforded him the favorable effective date treatment that the regulation provides. He argues that the Veterans Court, like the Board, "mistakenly interpreted the term 'relevant' as used in 38 C.F.R. § 3.156(c)(1) as related only to service department records that countered the basis of the prior denial." Appellant's Br. 5. In making this argument, he points to § 3.156(c)(1)(i), which provides in part that service department records "include, but are not limited to: . . . [s]ervice records that are related to a claimed in-service event, injury, or disease, regardless of whether such records mention the veteran by name, as long as the other requirements of [subsection] (c) of this section are met."[9] Appellant's Br. 8–9. Stating that nothing in the regulation "says

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ments were not relevant to the [VA's] decision" denying his 1982 claim); *see also* J.A. 147 (VA Response Brief before the Veterans Court explaining that the Board determined that the service records were not relevant). And at oral argument before us, the government abandoned its contention that Mr. Kisor had waived his argument regarding the interpretation of § 3.156(c)(1). Oral Argument at 18:47–21:30 (No.16-1929), http://oralarguments.cafc.uscourts.gov/default.aspx?fl=2016-1929.mp3. Accordingly, we decline to find waiver here. *See Singleton v. Wulff*, 428 U.S. 106, 121 (1976) (stating that waiver is an issue "left primarily to the discretion of the courts of appeals").

[9] There is no dispute that the personnel records at issue in this case are "service records" within the meaning of 38 C.F.R. § 3.156(c)(1)(i).

that the service records must relate to the reason for the last denial," Mr. Kisor urges that a service department record is relevant if it has "any tendency to make the existence *of any fact that is of consequence to the determination of the action* more probable or less probable than it would be without the evidence." Appellant's Br. 9–10 (quoting *Counts v. Brown*, 6 Vet. App. 473, 476 (1994)). According to Mr. Kisor, the newly-provided service department records demonstrate that he was subjected to the trauma of combat, thereby establishing his exposure to an in-service stressor. *Id.* at 12–13.

The government responds that the Veterans Court and the Board did not misinterpret § 3.156(c)(1). The government takes the position that whether a service department record is relevant depends upon the particular claim and the other evidence of record. Appellee's Br. 14. Thus, the government posits, "if a record is one that the VA had no obligation to consider because it would not have mattered in light of the other evidence, then it cannot trigger reconsideration." *Id.* at 15.

Turning to the case at hand, the government states that the records based upon which Mr. Kisor seeks reconsideration under § 3.156(c)(1) address only the issue of whether there was an in-service stressor, not the requisite medical diagnosis of PTSD. *Id.* at 17. The government states: "The issue of an in-service stressor was never disputed in the 1983 claim; in fact, the examiner noted that Mr. Kisor participated in Operation Harvest Moon and 'was involved in one major ambush which resulted in 13 deaths in a large company.'" *Id.* (citing J.A. 19–20). Accordingly, the government argues that none of the service department records at issue were rele-

vant under the regulation because they related to the existence of an in-service stressor, which was not in dispute, rather than to a diagnosis of PTSD, the absence of which was the basis for the RO's denial of Mr. Kisor's claim in 1983. *Id.* at 17–18.

Finally, the government urges us to reject Mr. Kisor's argument that the Veterans Court and the Board construed the regulation too narrowly because they interpreted relevance as "related only to records that countered the basis of the prior denial." *Id.* at 18 (citing Appellant's Br. 5). The government contends that neither tribunal required that the evidence relate to the basis for the prior denial in all cases. *Id.* at 18–19. Rather, the evidence simply has to be "relevant." The government concludes that "[i]t just so happened that in the present case, evidence related to the in-service stressor could not be relevant without a medical diagnosis for PTSD at the time of the previous claim." *Id.* at 19.

III.

For the following reasons, we hold that the Veterans Court did not misinterpret § 3.156(c)(1). We therefore affirm the court's decision affirming the Board's decision denying Mr. Kisor entitlement to an effective date earlier than June 5, 2006, for the grant of service connection for PTSD.

At the heart of this appeal is Mr. Kisor's challenge to the VA's interpretation of the term "relevant" in 38 C.F.R. § 3.156(c)(1).[10] As a general rule,

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[10] The Board interpreted 38 C.F.R. § 3.156(c)(1) when it ruled that Mr. Kisor's service department records were not "relevant" under that subsection. *See* J.A. 90–91. Because the Board is part of the VA, *see* 38 U.S.C. § 7101(a); *Henderson ex rel. Hen-*

we defer to an agency's interpretation of its own regulation "as long as the regulation is ambiguous and the agency's interpretation is neither plainly erroneous nor inconsistent with the regulation." *Gose v. U.S. Postal Serv.*, 451 F.3d 831, 836 (Fed. Cir. 2006) (citing *Gonzales v. Oregon*, 546 U.S. 243 (2006); *Christensen v. Harris Cty.*, 529 U.S. 576, 588 (2000); *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 413–14 (1945)); *see also Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 171 (2007) ("[A]n agency's interpretation of its own regulations is controlling unless plainly erroneous or inconsistent with the regulations being interpreted." (internal quotation marks omitted) (quoting *Auer v. Robbins*, 519 U.S. 452, 461 (1997))).

We hold that § 3.156(c)(1) is ambiguous as to the meaning of the term "relevant." In our view, the regulation is vague as to the scope of the word, and canons of construction do not reveal its meaning. *See Gose*, 451 F.3d at 839 (ruling that a regulatory phrase is ambiguous when "the regulation is vague as to the scope of the phrase"); *Cathedral Candle Co. v. Int'l Trade Comm'n*, 400 F.3d 1352, 1362 (Fed. Cir. 2005) (holding a statute ambiguous when "traditional tools of statutory construction" did not resolve the construction dispute). Significantly, § 3.156(c)(1) does not specify whether "relevant" records are those casting doubt on the agency's prior rating decision, those relating to the veteran's claim more broadly, or some other standard. This uncertainty in application suggests that the regulation is ambiguous. *See, e.g., Abbott Labs. v. United States*, 573 F.3d 1327, 1331 (Fed.

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*derson v. Shinseki*, 562 U.S. 428, 431 (2011), the Board's interpretation of the regulation is deemed to be the agency's interpretation.

Cir. 2009) (holding the regulatory term "affect" was ambiguous when the regulation did not specify the types of effects falling within its scope).

The varying, alternative definitions of the word "relevant" offered by the parties further underscore § 3.156(c)(1)'s ambiguity. *See Nat'l R.R. Passenger Corp. v. Bos. & Me. Corp.*, 503 U.S. 407, 418 (1992) ("The existence of alternative dictionary definitions . . . , each making some sense under the statute, itself indicates that the statute is open to interpretation."); *Hymas v. United States*, 810 F.3d 1312, 1320–21 (Fed. Cir. 2016). In his briefs, Mr. Kisor defines "relevant" in a way mirroring the federal rules of evidence. *Compare* Appellant's Br. 9–10 (defining "relevant" as "any tendency to make the existence of any fact that is of consequence to the determination of the action more [or less] probable" (emphasis omitted)), *with* Fed. R. Evid. 401(a)–(b) (defining "relevant" as "any tendency to make a fact more or less probable" when the "fact is of consequence in determining the action"). Mr. Kisor thus posits that his personnel records are "relevant" because they speak to the presence of an in service stressor, one of the requirements of compensation for an alleged service-connected injury. *See* 38 C.F.R. § 3.304(f).

The government, in contrast, collects various competing definitions from case law, legal dictionaries, and legal treatises. *See* Appellee's Br. 14–15 (defining "relevant" as, *inter alia*, "bearing upon or properly applying to the matter at hand," and "[l]ogically connected and tending to prove or disprove a matter *in issue*" (emphasis added) (citing *Forshey v. Principi*, 284 F.3d 1335, 1351 (Fed. Cir. 2002) (en banc); *Relevant*, BLACK'S LAW DICTIONARY (10th ed. 2014))). These definitions support the gov-

ernment's argument that, in this case, Mr. Kisor's personnel records were not "relevant" because they addressed the matter of an in-service stressor, which was not "in issue," rather than the issue of whether he suffered from PTSD, which was "in issue." Both parties insist that the plain regulatory language supports their case, and neither party's position strikes us as unreasonable. We thus conclude that the term "relevant" in § 3.156(c)(1) is ambiguous. *See Viraj Grp. v. United States*, 476 F.3d 1349, 1355–56 (Fed. Cir. 2007) (ruling that a "regulation is ambiguous on its face" when competing definitions for a disputed term "seem reasonable"); *Info. Tech. & Applications Corp. v. United States*, 316 F.3d 1312, 1320–21 (Fed. Cir. 2003).

Because § 3.156(c)(1) is ambiguous, the only remaining question is whether the Board's interpretation of the regulation is "plainly erroneous or inconsistent" with the VA's regulatory framework. *Long Island*, 551 U.S. at 171. As seen, the Board reasoned that Mr. Kisor's supplemental personnel records were not relevant because they contained information that (1) was already known, acknowledged, and undisputed in the RO's 1983 decision, and (2) did not purport to affect the outcome of that decision. J.A. 90–91. The Board's ruling was thus based upon the proposition that, as used in § 3.156(c)(1), "relevant" means noncumulative and pertinent to the matter at issue in the case. The Board's interpretation does not strike us as either plainly erroneous or inconsistent with the VA's regulatory framework.

In this case, the records Mr. Kisor submitted to the RO in 2006 detailing his participation in Operation Harvest Moon were superfluous to the information already existing in his file. Indeed, in 1983

the VA examiner expressly recounted how Mr. Kisor experienced "one major ambush which resulted in 13 deaths in a large company," and that "[t]his occurred *during Operation Harvest Moon*." J.A. 19–20 (emphasis added). In addition, Mr. Kisor's personnel records submitted in 2006 are not probative here because they do not purport to remedy the defects of his 1982 PTSD claim. The RO denied Mr. Kisor's PTSD claim because the requisite diagnosis of PTSD was lacking. J.A. 21–23; *see* 38 C.F.R. § 3.304(f) (requiring a diagnosis of PTSD to establish service connection); *Young v. McDonald*, 766 F.3d 1348, 1354 (Fed. Cir. 2014) ("[T]he VA has long required a medical diagnosis of PTSD to establish service connection."). Mr. Kisor does not urge that the 2006 records provide that diagnosis. *See* Appellant's Br. 5–6. Instead, the records show that Mr. Kisor was exposed to an in-service stressor—a wholly separate element for establishing service connection that, critically, was never at issue in the case. J.A. 19–20. Because Mr. Kisor's 2006 records did not remedy the defects of his 1982 claim and contained facts that were never in question, we see no plain error in the Board's conclusion that the records were not "relevant" for purposes of § 3.156(c)(1). *See Blubaugh*, 773 F.3d at 1314 (reasoning that § 3.156(c) did not apply when service records "did not remedy [the] defects" of a prior rating decision and contained facts that "were never in question").

Finally, as noted, Mr. Kisor argues that the Board and Veterans Court construed § 3.156(c)(1) too narrowly, by interpreting "relevant" records to be "records that countered the basis of the prior denial [of benefits]." Appellant's Br. 5. We do not agree with this reading of the Board's or the Veterans Court's decision. Nothing in either tribunal's interpretation

of § 3.156(c)(1) strikes us as requiring, across the board, that relevant records *must* relate to the basis of a prior denial. Rather, we understand the Board and Veterans Court as finding only that, on the facts and record of this case, Mr. Kisor's later-submitted materials were not relevant to determination of *his* claim. *See Kisor*, 2016 WL 337517, at *2–3.

## CONCLUSION

For the foregoing reasons, we see no error in the Board's interpretation of § 3.156(c)(1) or in the Veterans Court's affirmance of the Board's interpretation. *See Kisor*, 2016 WL 337517, at *2. The decision of the Veterans Court affirming the Board's decision denying Mr. Kisor entitlement to an effective date earlier than June 5, 2006 for service connection for PTSD is therefore affirmed.

**AFFIRMED**

## COSTS

No costs.

## APPENDIX B

*Designated for electronic publication only*

## UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 14-2811

James L. Kisor, Appellant,

v.

Robert A. McDonald,
Secretary of Veterans Affairs, Appellee.

Before LANCE, *Judge*.

## MEMORANDUM DECISION

*Note: Pursuant to U.S. Vet. App. R. 30(a), this action may not be cited as precedent.*

LANCE, *Judge*: The appellant, James L. Kisor, through counsel, appeals an April 29, 2014, Board of Veterans' Appeals (Board) decision that denied entitlement to an effective date earlier than June 5, 2006, for the grant of service connection for post-traumatic stress disorder (PTSD), to include on the basis of clear and unmistakable error (CUE) in a May 1983 rating decision. Record (R.) at 2-18. Single-judge disposition is appropriate. *See Frankel v.*

*Derwinski*, 1 Vet.App. 23, 25-26 (1990). This appeal is timely, and the Court has jurisdiction over the case pursuant to 38 U.S.C. §§ 7252(a) and 7266. For the reasons that follow, the Court will affirm the April 29, 2014, decision.

## I. FACTS

The appellant served in the U.S. Marine Corps from November 1962 to November 1966, including service in Vietnam. R. at 177, 1053. In December 1982, the appellant filed his initial claim for VA disability compensation benefits for PTSD. R. at 1043-46. The Portland, Oregon, VA regional office (RO) issued a rating decision in May 1983 that denied the appellant's claim, finding that there was no current diagnosis for PTSD. R. at 1003-05. The appellant initiated but did not perfect an appeal of that decision, R. at 1001, and it became final.

In June 2006, the appellant submitted a request to reopen his previously denied claim for service connection for PTSD and submitted additional evidence. R. at 961-65. In September 2007, the RO issued a rating decision that reopened the appellant's previously denied claim, granted service connection for PTSD, and assigned a 50% disability rating, effective June 2006. R. at 730-33. The appellant filed a Notice of Disagreement in November 2007 challenging both the assigned disability rating and effective date and alleging CUE in the May 1983 rating decision. R. at 707-11. The RO issued a decision review officer decision in March 2009 that increased the appellant's initial schedular rating to 70% disabling and granted a 100% rating on an extraschedular basis, effective June 2006. R. at 643-48. In January 2010, the RO issued a Statement of the Case denying entitlement to an earlier effective date for the grant of service con-

nection for PTSD, including on the basis of CUE. R. at 379-91. The appellant perfected his appeal in March 2010. R. at 349-58.

On April 29, 2014, the Board issued the decision here on appeal, finding that "the effective date assigned [(June 5, 2006)] was the earliest allowable effective date due to the finality of the May 1983 rating decision." R. at 9. The Board also found that "the lack of [recently received service department] documents before the adjudicator in May 1983 was not CUE" and, therefore, denied the appellant an earlier effective date on that basis. R. at 16. This appeal followed.

## II. ANALYSIS

The appellant argues that the Board failed to consider and apply the provisions of 38 C.F.R. § 3.156(c). Appellant's Brief (Br.) at 1-9; Reply Br. at 1-7. Specifically, he contends that the Board "mistakenly considered and misapplied the provisions of § 3.156(c) **only** in the context of its consideration of whether there was [CUE] in the . . . May 1983 decision." Appellant's Br. at 5. The Secretary responds that the Board appropriately considered and applied the provisions of § 3.156(c) to the evidence in question. Secretary's Br. at 13-21.

If a previously denied claim is later reopened and granted based on the submission of new and material evidence, the effective date of benefits will ordinarily be the date that the claimant filed the application to reopen or the date entitlement arose, whichever is later. 38 U.S.C. § 5110(a); 38 C.F.R. § 3.400(q)(2) (2015). However, if the award is based on newly discovered service department records, the claimant may be entitled to an effective date as early as the

date of the original claim. *Mayhue v. Shinseki*, 24 Vet.App. 273, 279 (2011); 38 C.F.R. § 3.156(c) (2015).

The appellant asserts that "[i]t was a clear error for the Board to have failed to consider or apply the provisions of § 3.156(c) because the VA's receipt of relevant service records, which had not been previously considered by the VA, required the VA to reconsider [his] initial claim." Appellant's Br. at 6. The Court disagrees. Here, the Board specifically acknowledged that "[a] claim that is disallowed, even if the disallowance became final, is to be reconsidered instead of reopened if relevant service department records which existed but were not available at the time are received at any time thereafter." R. at 13 (citing 38 C.F.R. § 3.156(c)). The Board also noted that the regulation requires that "the effective date [be] the later of the date the previously decided claim was received or the date entitlement arose." *Id.*

Contrary to the appellant's assertions, the Board explicitly acknowledged that "[s]ervice department records were received following the May 1983 rating decision" which "fall under the purview of § 3.156(c)(1)(i)." R. at 14-15. The Board determined, however, that the newly received records were not relevant. R. at 15; *see Prickett v. Nicholson*, 20 Vet.App. 370, 375 (2006) (Board decision generally should be read as a whole). The Board noted that"[t]he May 1983 rating decision denied service connection because there was no diagnosis of PTSD" and, thus, that "relevant evidence, whether service department records or otherwise, received after the rating decision would suggest or better yet establish that the [appellant] has PTSD as a current disability." R. at 15.

However, the Board determined that the newly received "service personnel records and the daily log skip this antecedent to address the next service connection requirement of a traumatic event during service." R. at 15. The Board concluded that "those documents were not outcome determinative in that they do not manifestly change [the] outcome of the decision . . . [as] the basis of the [May 1983] denial that a diagnosis of PTSD was not warranted, not a dispute as to whether or not the [appellant] engaged in combat with the enemy during service." *Id.* The appellant does not assert that the service department records contain a diagnosis of PTSD.

In its recent decision in *Young v. McDonald*, the United States Court of Appeals for the Federal Circuit (Federal Circuit) held that, "[i]n order to determine the 'date entitlement arose' within the meaning of 38 C.F.R. § 3.156(c), it is necessary to look at [the criteria establishing service connection for PTSD]." 766 F.3d 1348, 1352 (Fed. Cir. 2014). The Federal Circuit concluded that "entitlement could not arise until the pertinent regulatory requirements were satisfied, including the existence of 'medical evidence diagnosing'" PTSD. *Id.* at 1354 (quoting 38 C.F.R. § 3.304(f)). Accordingly, the Court agrees with the Secretary that "a full reading of the instant decision clearly shows that the [Board] raised application of 38 C.F.R. § 3.156(c)," but ultimately concluded that the newly received documents were not relevant. Secretary's Br. at 13-14; *see Prickett*, 20 Vet.App. at 375.

Finally, the Court need not address the appellant's argument that "this case presents an issue of regulatory interpretation" regarding the meaning of the phrase "that existed" in § 3.156(c)(1), Appellant's

Br. at 8, as the Board's decision did not turn on that question but rather on whether the records were relevant, R. at 15. In all, the Court is not persuaded that the Board incorrectly applied § 3.156(c), and it holds that the appellant has failed to demonstrate error in the Board's findings that an effective date earlier than June 5, 2006, is not warranted for the grant of service connection for PTSD. *See Evans v. West*, 12 Vet.App. 396, 401 (1999) (holding that the Court reviews the Board's determination of the proper effective date under the "clearly erroneous" standard of review); *Hilkert v. West*, 12 Vet.App. 145, 151 (1999) (en banc) ("An appellant bears the burden of persuasion on appeals to this Court."), *aff'd per curiam*, 232 F.3d 908 (Fed. Cir. 2000) (table). The Court will, therefore, affirm the Board's decision.

## III. CONCLUSION

After consideration of the appellant's and the Secretary's briefs, and a review of the record, the Board's April 29, 2014, decision is AFFIRMED.

DATED: January 27, 2016

Copies to:

Kenneth M. Carpenter, Esq.

VA General Counsel (027)

# APPENDIX C

## BOARD OF VETERANS' APPEALS
## DEPARTMENT OF VETERANS AFFAIRS
## WASHINGTON, DC 20420

## IN THE APPEAL OF JAMES L. KISOR

**DOCKET NO. 10-08 429A**

DATE APR 29 2014

On Appeal From The
Department Of Veterans Affairs Regional Office In
Portland, Oregon

### THE ISSUE

Entitlement to an effective date earlier than June 5, 2006, for the grant of service connection for posttraumatic stress disorder (PTSD), to include on the basis of clear and unmistakable error (CUE) in a May 1983 rating decision,

### REPRESENTATION

Veteran represented by: Philip E. Cushman, Agent

### WITNESSES AT HEARING ON APPEAL

Veteran and Spouse

### ATTORNEY FOR THE BOARD

S. Becker, Counsel

### INTRODUCTION

The Veteran served on active duty from November 1962 to November 1966, to include service in the Republic of Vietnam (RVN).

This matter comes before the Board of Veterans' Appeals (Board) on appeal from a September 2007 rating decision of the Department of Veterans Affairs (VA) Regional Office (RO) in Portland, Oregon, that granted service connection for PTSD effective June 5, 2006.

The Board remanded this claim for a hearing before a Veterans Law Judge in February 2012. The Veteran and spouse testified with the assistance of the representative before the undersigned in June 2012.

The representative was appointed when the appropriate form was received, with a statement that no compensation is being paid in March 2009. The representative is not accredited by VA. Therefore, this matter is the one time this representative can act in that capacity unless an exception is granted. 38 U.S.C.A. § 5903 (West Supp. 2013); 38 C.F.R. § 14.630 (2013).

## FINDING OF FACT

There is no basis for an effective date earlier than June 5, 2006, and the May 1983 did not contain CUE or due process violation, and equitable tolling is not for application, and service department records received thereafter were not relevant.

## CONCLUSION OF LAW

An effective date earlier than June 5, 2006, for the grant of service connection for PTSD is not warranted. 38 U.S.C.A. § 4005 (West 1982); 38 U.S.C.A. §§ 5103, 5103A, 5107, 5109A, 5110, 7105 (West 2002); 38 C.F.R. §§ 3.160, 19.115, 19.116, 19.118, 19.153 (1982); 38 C.F.R. §§ 3.156, 3.400

(2006); 38 C.F.R. §§ 3.1, 3.102, 3.105, 3.155, 3.156, 3.157, 3.159, 3.160, 3.400, 19.29, 20.202, 20.302, 20.1103 (2013).

## REASONS AND BASES FOR FINDING AND CONCLUSION

*Duties to Notify and Assist*

VA has a duty to notify and a duty to assist the claimant in substantiating a claim for VA benefits. 38 U.S.C.A. §§ 5103, 5103A (West 2002);38 C.F.R. § 3.159 (2013). However, those duties are not applicable when the law and not the evidence is dispositive. *Smith v. Gober*, 14 Vet. App. 227 (2000), *aff'd*, 281 F.3d 1384 (Fed. Cir. 2002); *Mason v. Principi*, 16 Vet. App. 129 (2002); *Manning v. Principi*, 16 Vet. App. 534 (2002); *Livesay v. Principi*, 15 Vet App 165 (2001); *Dela Cruz v. Principi*, 15 Vet. App. 143 (2001); *Sabonis v. Brown*, 6 Vet. App. 426 (1994); VAOPGCPREC 5-2004 (2004), 69 Fed. Reg. 59,989 (2004). That is the case in this matter, and is often is the case regarding an earlier effective date claim. *Nelson v. Principi*, 18 Vet. App. 407 (2004). It always is the case regarding CUE. *Parker v. Principi*, 15 Vet. App. 407 (2002).

Even if the duties to notify and assist were applicable, the Board finds that they have been satisfied. A letter dated in September 2006 notified the Veteran and his representative regarding the claim. The letter included information on how an effective date is assigned if service connection is granted. The letter reiterated that service connection was granted in the September 2007 rating decision. In other words, any notice defect was not prejudicial and no further notice was required because the claim was substantiated. *Hartman v. Nicholson*, 483 F.3d 1311 (Fed.

Cir. 2007); *Dunlap v. Nicholson*, 21 Vet. App. 112 (2007). No assistance, whether in the form of procuring records, providing a medical examination or opinion, or otherwise, has been identified by the Veteran or representative as necessary.

***Earlier Effective Date***

The effective date of an award of benefits shall be the day following discharge if application therefor is received within one year from that date. 38 U.S.C.A. § 5110(b)(1) (West 2002). Otherwise, the effective date of an award shall be fixed in accordance with the facts found but shall not be earlier than the date of receipt of the claim for compensation. 38 U.S.C.A. § 5110(a) (West 2002). Regulations governing the effective date of an award for a claim reopened after final disallowance based on the receipt of new and material evidence generally specify that it is the date of receipt of the claim to reopen or the date entitlement arose, whichever is later. 38 C.F.R. §§ 3.400(q)-(r) (2013).

Neither the Veteran nor his representative has alleged that he filed a service connection claim for PTSD between his discharge from service in November 1966 and November 1967. Accordingly, the earliest effective date possible is the date of receipt of a claim for service connection for PTSD. A claim is a written formal or informal communication requesting a determination of entitlement, or evidencing a belief in entitlement, to a benefit. 38 C.F.R. § 3.1(p) (2013). An informal claim is a communication or action indicating intent to apply for a benefit. 38 C.F.R. § 3.155(a) (2013). In certain circumstances, VA or private medical evidence may be accepted as an informal claim. 38 C.F.R. § 3.157 (2013).

Neither the Veteran nor representative has alleged that a formal or informal claim was filed prior to December 3, 1982. There are no communications requesting or asserting a belief in entitlement to service connection for PTSD before that date. There also are no communications indicating, or suggesting, an intent to apply for service connection for PTSD before that date. There are no communications of record from the Veteran or otherwise referencing PTSD prior to it. No medical evidence, whether VA or private, is of record before that date. The first pertinent document is the Veteran's formal service connection claim for PTSD received on December 3, 1982.

That claim was denied in a May 9, 1983, rating decision because he did not have a diagnosis of PTSD. It was noted that, in addition to service medical records, a February 1983 letter from the Portland Vet Center was considered. The service medical records did not contain a diagnosis or manifestations of any mental illness. The letter discussed the Veteran's symptoms, for which he had received treatment, and indicated that they were associated with a diagnosis of PTSD. However, a March 1983 VA medical examination diagnosed intermittent explosive disorder and atypical personal disorder. The examination report reveals that those diagnoses were made in favor of a diagnosis of PTSD, which specifically was rejected.

A disallowance is final when a notice of disagreement is not filed by the claimant within the one year period from the date of notice of it. 38 U.S.C.A. §§ 4005(b)(1), (c) (West 1982) (today 38 U.S.C.A. §§ 7105(b)(1), (c) (West 2002); 38 C.F.R. §§ 3.160(d), 19.118(a)(1) (1982) (today 38 C.F.R. § 3.160(d),

20.302(a) (2013)). If a notice of disagreement is timely filed, a statement of the case is issued. 38 U.S.C.A. § 4005(d)(1) (West 1982) (today 38 U.S.C.A. § 7105(d)(1) (West 2002)); 38 C.F.R. §§ 19.115(b), (c) (1982) (today 38 C.F.R. § 19.29 (2013)). The claimant then has 60 days from the date the statement of case is mailed or the remainder of the one year period after notification of the decision, whichever is later, to file a formal or substantive appeal. 38 U.S.C.A. § 4005(d)(3) (West 1982) (today 38 U.S.C.A. § 7105(d)(3) (West 2002)); 38 C.F.R. § 19.118(b)(1) (1982) (today 38 C.F.R. § 20.302(b)(1) (2013)). The failure to timely file an appeal results in the disallowance becoming final. 38 C.F.R. § 19.153 (1982) (today 38 C.F.R. § 20.1103 (2013)).

Immediately following the May 1983 rating decision, the Veteran was notified of it on May 13, 1983. He timely filed a notice of disagreement in June 1983. A June 13, 1983, statement of the case was issued on June 14, 1983. The Veteran had from then until May 13, 1984, the remainder of the one year period from the date of notice of the rating decision, to file a formal or substantive appeal. However, it appears that he believed he only had 60 days to file such an appeal. A request for an extension, based on pending evidence, indeed was received on August 10, 1983. That request was granted by a letter dated August 19, 1983. A reasonable extension is permissible for good cause. 38 U.S.C.A. § 4005(d)(3) (West 1982) (today 38 U.S.C.A. § 7105(d)(3) (West 2002)). The Veteran was allowed an additional 60 days from that date to file a formal or substantive appeal.

In September 1983, the Veteran submitted a letter requesting another VA medical examination. He claimed that the examination report noted that a

portion of the original dictation of the examination was lost and that the examiner misunderstood some of what he related. A September 1983 letter from the Veteran's representative also requested another VA medical examination on the grounds that the March 1983 examination was inadequate. A letter dated October 17, 1983, informed him and his representative that the examination was sufficient for diagnostic purposes. It was noted that no change in the previous determination was warranted and that service connection for PTSD remained denied.

A formal or substantive appeal consists of the appropriate form or correspondence containing information necessary to appeal such as identification of the issues being appealed, if the claim is comprised of more than one, and specific arguments relating to errors of law or fact made in disallowing the benefits sought. 38 U.S.C.A. § 4005(d)(3) (West 1982) (today 38 U.S.C.A. § 7105(d)(3) (West 2002)); 38 C.F.R. §§ 19.115(c)(2), 19.116 (1982) (today 38 C.F.R. § 20.202 (2013)). No timely substantive appeal form was received from the Veteran or his representative within the applicable appeal period. Neither has alleged that one or both of the September 1983 letters constituted a formal or substantive appeal. Both lacked necessary information for an appeal. They do not indicate that service connection for PTSD, the sole issue of his claim, was being appealed. It follows that neither is a formal or substantive appeal even if the contents could be interpreted as an identification of specific errors of law or fact. Without such an appeal, the May 1983 rating decision disallowing service connection became final.

Neither the Veteran nor his representative has alleged that, other than the aforementioned claim, a

formal or informal claim was filed prior to June 5, 2006. There are no communications subsequent to the September 1983 letters, but before that date requesting or asserting a belief in entitlement to service connection for PTSD. There are also no communications indicating, or even suggesting, an intent to apply for service connection for PTSD subsequent to the letters but before that date. there are no communications from the Veteran or otherwise referencing PTSD during that time. No additional medical evidence, whether VA or private, exists before that time. Thus, the next pertinent document is the Veteran's claim to reopen service connection for PTSD received on June 5, 2006. That claim is informal because, rather than the appropriate form, it is a letter. Yet it clearly conveys his desire to apply for service connection for PTSD.

The Board finds that the date of receipt of the Veteran's claim to reopen on June 5, 2006, is the earliest effective date allowable for the grant of service connection based on new and material evidence. The RO first reopened the claim in a September 2007 rating decision. Service connection was granted, effective June 5, 2006. The Board finds that the effective date assigned was the earliest allowable effective date due to the finality of the May 1983 rating decision. The only way to obtain an even earlier effective date accordingly is to successfully challenge the validity of the May 1983 decision. However, there is a strong presumption of validity. The burden on the Veteran and his representative is substantial. *Grover v. West*, 12 Vet. App. 109 (1999); *Daniels v. Gober*, 10 Vet. App. 474 (1997); *Caffrey v. Brown*, 6 Vet. App. 377 (1994).

Several arguments have been made by the Veteran and representative to attempt to vitiate the finality of the May 1983 rating decision. First, they assert that a page of service personnel records noting the Veteran's participation in Operation Harvest Moon in the Vietnam was obtained, but destroyed, prior to the May 1983 decision. They alternatively contend that page should have been, but was not, prior to the May 1983 decision. The Veteran and his representative reiterate the previously expressed belief that reliance in May 1983 decision on a March 1983 VA examination was inappropriate and that another VA medical examination should have been provided. They also allege that treatment records from the Portland Vet Center should have been, but were not, obtained prior to the May 1983 decision. Finally, the Veteran's contends that his mental state prevented him from acting to ensure the benefit sought was granted prior to June 5, 2006.

The arguments that a page of service personnel records was obtained, but destroyed, prior to the May 1983 decision does not appear to be correct. The only proof offered by the Veteran and his representative is the reference in the June 1983 statement of the case that service medical records were received from the National Personnel Records Center on April 11, 1983. However, service medical records are not the same as service personnel records. The Veteran's service medical records were obtained by VA prior to the May 1983 rating decision as stated in the statement of the case and they were considered in the May 1983 rating decision. The page of the Veteran's service personnel records noting his participation in Operation Harvest Moon in the Vietnam was first submitted by him in June 2006. Service personnel records, to include that page, were not requested by

VA until November 2006. They were received at some unspecified point thereafter. Therefore, the page in question was not obtained, but then destroyed, prior to the May 1983 rating decision.

Regarding the argument that the service personnel records and Vet Center records should have been obtained prior to the May 1983 decision, which equates to an allegation of a duty to assist failures, the Veteran and his representative have characterized that argument as a claim of violations of the Due Process Clause of the Fifth Amendment of the United States Constitution. It states that "no person shall ... be deprived of life, liberty, or property, without due process of law." US Const. Amend. V. A property interest, in that compensation often is paid to one entitled to a VA disability benefit, is at issue. Even Veterans claiming such a benefit, as opposed to just Veterans who have established entitlement to it, have a due process right to fair adjudication. *Cushman v. Shinseki*, 576 F.3d 1290 (Fed. Cir. 2009) (reliance on an altered VA treatment record in denying a total disability rating based on individual unemployability violated due process). However, that case does not stand for the proposition that any theory that VA failed in its duty to assist constitutes a violation of due process. *Schimek v. Shinseki*, 2012 WL 263098 (Vet. App. Jan. 31, 2012): *Schimek*, as it was not reported, is not a decision of precedent. However, nonprecedential decisions may be relied upon for any persuasive reasoning they contain. *Bethea v. Derwinski*, 2 Vet. App. 252 (1992). Some duty to assist failures, are so egregious that they are due process violations. Evidence was altered to the detriment of the Veteran's representative, and no explanation could be provided. That first was discovered years after adjudication. No remedy other than

due process could serve as a cure for the tainted adjudication. Other duty to assist failures are not as significant. An example is not considering available evidence. *King v. Shinseki*, 26 Vet. App. 433 (2014). That could be discovered at the time of the adjudication, and a CUE motion could serve as a remedy for the tainted adjudication even if discovery was later. *King v. Shinseki*, 26 Vet. App. 433 (2014).

Even assuming that the duty to assist arguments regarding the claim of CUE are correct, they are not due process violations. The Veteran knew about the assumed VA medical examination deficiency shortly following the May 1983 rating decision given his September 1983 letter. He also either knew or should have known about the assumed deficiency in not obtaining his Portland Vet Center treatment records. Indeed, it appears that he submitted the February 1983 letter from the Vet Center. It mentions treatment, which implies records, that he was undergoing. Yet be did not either submit the treatment records or request they be obtained by VA. Even if he did not submit that letter, he was aware that he was undergoing treatment. The only possible explanation for no treatment records being referenced in the rating decision and the June 1983 statement of the case is that they had not been obtained. The Veteran either knew or should have known about the assumed deficiency in not obtaining the page of his service personnel records noting his participation in Operation Harvest Moon in the RVN for that same reason.

The remedy available to the Veteran was to appeal. He initiated an appeal but did not perfect it, notwithstanding his knowledge or at least his ability to know of the aforementioned assumed duty to assist failures. He had an opportunity to claim the as-

sumed failures to try to rectify them. Due process requires nothing more. *Prinkey v. Shinseki*, 735 F.3d 1375 (Fed.Cir.2013); *Guillory v. Shinseki*, 603 F.3d 981 (Fed.Cir.2010). Yet the Veteran ultimately chose not to perfect an appeal. That he did not avail himself of an appeal when he could have is not sufficient reason to deem the May 1983 rating decision invalid. Additional support for this is derived from the fact that the assumed duty to assist failures were not particularly egregious. No evidence was altered to the Veteran's detriment. No evidence was altered. Evidence instead was not obtained when it assumedly should have been, and assumedly impermissible reliance was placed on less than complete evidence in the case of the VA medical examination.

To the extent the arguments continue to be characterized by the Veteran and his representative as CUE in the May 1983 rating decision, they must fail. The statutory provision and regulatory provision regarding CUE are not enlightening as to its nature. 38 U.S.C.A. § 5109A (West 2002); 38 C.F.R. § 3.105(a) (2013). Yet well-established case law is enlightening. CUE is a very specific and rare kind of error. *Fugo v. Brown*, 6 Vet. App. 40 (1993). A determination that there was CUE must be based on the law and evidence at the time of the challenged adjudication. *Damrel v. Brown*, 6 Vet App. 242 (1994). The error must have been outcome determinative in that the result would have been different but for it. *Fugo v. Brown*, 6 Vet. App. 40 (1993); *Russell v. Principi*, 3 Vet. App. 310 (1992).

It is well-established that duty to assist failures do not constitute CUE. *Baldwin v. West*, 13 Vet. App. 1 (1999); *Shockley v. West*, 11 Vet. App. 208 (1998); *Crippen v. Brown*, 9 Vet. App. 412 (1996). Therefore,

the assumed failures of not providing the Veteran with another VA medical examination, not obtaining a page of service personnel records noting his participation in Operation Harvest Moon, and not obtaining his treatment records from the Portland Vet Center are not CUE. It is reiterated that CUE can only be based on the examination and records available at the time of the May 1983 rating decision, not on that which should have been but was not available then. The reliance placed in the rating decision on the March 1983 VA examination also does not constitute CUE. Even assuming this reliance was inappropriate, it was not outcome determinative. Service connection still would have been denied absent it because the rater weighed the evidence and determined that there was no diagnosis of PTSD. Even had Vet Center records been of record and showed additional information regarding a diagnosis of PTSD, the rating specialist could still have relied upon the March 1983 VA examination. A challenge to the weigh in which evidence was weighed by the adjudicator cannot constitute CUE. Even if the Vet Center records had been reviewed and the page of service personnel records, reasonable minds can differ as to whether service connection for PTSD would have been allowed. Therefore, there is not CUE.

The argument that the Veteran was of insufficient mental capacity to pursue his claim is essentially an argument for equitable tolling. Equitable tolling applies where the Veteran's failure to act was the direct result of a mental illness that rendered him incapable of rational thought or deliberate decision making, handling his affairs, or functioning in society. *Barrett* v. *Principi*, 363 F.3d 1316 (Fed. Cir. 2004). There is a rebuttable presumption that all federal statutes of limitations contain an implied eq-

uitable tolling provision. *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89 (1990). However, 38 U.S.C.A. § 5110 (West 2002) is not a federal statute of limitations. *Butler v. Shinseki*, 603 F.3d 922 (Fed. Cir. 2010); *Andrews v. Principi*, 351 F.3d 1134 (Fed. Cir. 2003). It is a federal statute setting forth when awards begin. Therefore, equitable tolling is not for consideration.

Equitable tolling, even assuming it was for consideration, would not be warranted. No proof has been offered that the Veteran's failure to act to ensure service connection was granted effective prior to June 5, 2006, was due to mental illness rendering him incapable of rational thought, deliberate decision making, handling his affairs, or functioning in society. Despite problems, all indications are to the contrary. It was determined at the March 1983 VA medical examination that the Veteran's functioning was fair and that he was capable of handling funds. A February 1983 VA social summary concluded that he expressed himself well. The Veteran successfully filed his claim, initiated an appeal, and requested an extension for perfecting an appeal. Thus, he was rational and deliberate in decision making. An August 2007 private medical examination and a September 2007 VA medical examination, both of which covered his history to some extent, show nothing suggestive of irrationality or an inability to make decisions deliberately, handle affairs, or function in society subsequently.

Although not argued by the Veteran or his representative, another way to challenge the May 1983 rating decision must be considered. That challenge does not concern the validity of the decision but, like equitable tolling, concerns finality. A claim that is

disallowed, even if the disallowance became final, is to be reconsidered instead of reopened if relevant service department records which existed but were not available at that time are received at any time thereafter. 38 C.F.R. § 3.156(c)(l) (2013). That regulation was amended on October 6, 2006. However, both prior to and after that amendment, the effective date was the later of the date the previously decided claim was received or the date entitlement arose. 38 C.F.R. § 3.400(q)(2) (2006); 38 C.F.R. § 3.156(c)(3) (2013); *Mayhue v. Shinseki*, 24 Vet. App. 273 (2011); *Vigil v. Peake*, 22 Vet. App. 63 (2008).

The version of 38 C.F.R. § 3.156(c) in effect prior to October 6, 2006, and the amended version in effect as of October 6, 2006, are very similar. With one exception, the changes made indeed were for clarification purposes and thus were not substantive in nature. *Mayhue v. Shinseki*, 24 Vet. App. 273 (2011). That exception, the exclusion of service department records that could not have been obtained when the claim was disallowed because they did not exist or the Veteran failed to provide sufficient information regarding them in 38 C.F.R. § 3.156(c)(2) (2013), does not have retroactive effect. *Cline v. Shinseki*, 26 Vet. App. 18 (2012). Yet it is clear from the ensuing discussion that the exception is not applicable here. As the only substantive change is of no consequence, only the amended version of 38 C.F.R. § 3.156(c) currently in effect will be referenced therein for the sake of simplicity.

Service department records were received following the May 1983 rating decision. The Veteran's service personnel records, which encompasses the page noting his participation in Operation Harvest Moon in the Vietnam, were submitted and obtained. The

daily log of his battalion in Vietnam for a date in December 1965 also was received in June 2007. Examples of service department records qualifying as relevant and in existence but unavailable at the time of the previous disallowance include service records concerning a claimed in-service injury, disease, or event regardless of whether they mention the Veteran by name. 38 C.F.R. § 3.156(c)(l)(i) (2013). They also include service records forwarded by the service department at any time after VA's initial request. 38 C.F.R. § 3.156(c)(1)(ii) (2013). Lastly, they include declassified records that could not have been obtained when the claim was decided because they were still classified at the time. 38 C.F.R. § 3.156(c)(1)(iii) (2013).

With respect to the daily log, the word declassified appears at the bottom. There is no indication of whether it ever was classified. Assuming it was at some point classified, there is no indication of when it was declassified. It therefore cannot be concluded, at least not without more, that the daily log could not have been obtained at the time of the May 1983 rating decision because it was classified. The Veteran's service personnel records never were classified. It is reiterated that both the daily log and those records were not requested until well after the May 1983 rating decision. The Veteran never alleged that PTSD was attributable to sustaining an injury or disease during service. He instead alleged that he suffered an in-service event which led to PTSD. His service personnel records concern him in particular but do not concern PTSD. The daily log, in addition to not concerning PTSD, does not concern him in particular.

The Veteran's service personnel records do not concern any specific traumatic event potentially causing PTSD. However, he contends the page noting his participation in Operation Harvest Moon concerns combat service which inherently is traumatic and has the potential to cause PTSD. The daily log is similar in that it recounts his battalion coming under enemy fire. Both it and the service personnel records accordingly fall under the purview of 38 C.F.R. § 3.156(c)(1)(i) (2013). Yet the "other [applicable] requirements" must be met. 38 C.F.R. § 3.156(c)(1)(i) (2013). One such requirement is that the service department records must have existed but been unavailable at the time of the previous disallowance. Once again, whether or not this was true regarding the daily log is unknown. Another requirement is that the service department records be relevant.

Unfortunately, the Veteran's service personnel records and the daily log are not relevant. The May 1983 rating decision denied service connection because there was no diagnosis of PTSD. A current disability was not found. Service connection can be granted only if there is a current disability. *Brammer v. Derwinski*, 3 Vet. App. 223 (1992). Thus, the rating decision did not address whether or not the Veteran suffered a traumatic event during service. It follows that relevant evidence, whether service department records or otherwise, received after the rating decision would suggest or better yet establish that the Veteran has PTSD as a current disability. His service personnel records and the daily log skip this antecedent to address the next service connection requirement of a traumatic event during service.

The Board also finds that those documents were not outcome determinative in that they do not mani-

festly change to outcome of the decision. Even had combat been shown in service, there finding that a diagnosis of PTSD was not warranted would not have been incorrect, such that reasonable minds cannot differ. Thus, the lack of those documents before the adjudicator in May 1983 was not CUE. Furthermore, those documents were not relevant to the decision in May 1983 because the basis of the denial was that a diagnosis of PTSD was not warranted, not a dispute as to whether or not the Veteran engaged in combat with the enemy during service.

Accordingly, the Board finds that an effective date earlier than June 5, 2006, is not warranted for the grant of service connection for PTSD. The benefit sought by the Veteran is denied. In reaching that determination, not all of the evidence has been discussed. Yet discussion of only the most salient evidence is permissible provided that all the evidence is reviewed. *Gonzales v. West*, 218 F.3d 1378 (Fed. Cir. 2000). That has been done here. The Board finds that the preponderance of the evidence is against the claim for earlier effective date. Also, no CUE is shown in a May 1983 rating decision. Therefore, the claim is denied. 38 U.S.C.A. § 5107 (West 2002); 38 C.F.R. § 3.102 (2013); *Gilbert v. Derwinski*, 1 Vet. App. 49 (1990).

ORDER

Entitlement to an effective date earlier than June 5, 2006, for the grant of service connection for PTSD, to include on the basis of CUE in a May 1983 rating decision, is denied.

*/s/ Harvey P. Roberts*
HARVEY P. ROBERTS
Veterans Law Judge, Board of Veterans' Appeals

## APPENDIX D

**United States Court of Appeals**
**for the Federal Circuit**

**JAMES L. KISOR,**
*Claimant-Appellant*

v.

**DAVID J. SHULKIN,**
**SECRETARY OF VETERANS AFFAIRS,**
*Respondent-Appellee*

2016-1929

Appeal from the United States Court of Appeals for Veterans Claims in No. 14-2811, Judge Alan G. Lance, Sr.

**ON PETITION FOR PANEL REHEARING AND REHEARING EN BANC**

KENNETH M. CARPENTER, Law Offices of Carpenter Chartered, Topeka, KS, filed a combined petition for panel rehearing and rehearing en banc for claimant-appellant.

IGOR HELMAN, Commercial Litigation Branch, Civil Division, United States Department of Justice, Washington, DC, filed a response to the petition for

respondent-appellee. Also represented by CHAD A. READLER, ROBERT E. KIRSCHMAN, JR., MARTIN F. HOCKEY, JR.; Y. KEN LEE, SAMANTHA ANN SYVERSON, Office of General Counsel, United States Department of Veterans Affairs, Washington, DC.

Before PROST, *Chief Judge*, NEWMAN, LOURIE, SCHALL*, DYK, MOORE, O'MALLEY, REYNA, WALLACH, TARANTO, CHEN, HUGHES, and STOLL, *Circuit Judges*.

O'MALLEY, *Circuit Judge*, with whom NEWMAN and MOORE, *Circuit Judges*, join, dissent from the denial of the petition for rehearing en banc.

PER CURIAM.

ORDER

Appellant filed a combined petition for panel rehearing and rehearing en banc. A response to the petition was invited by the court and filed by the appellee.

The petition for rehearing was referred to the panel that heard the appeal, and thereafter, the petition and response were referred to the circuit judges who are in regular active service. A poll was requested, taken, and failed.

Upon consideration thereof,

IT IS ORDERED THAT:

The petition for panel rehearing is denied.

The petition for rehearing en banc is denied.

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* Circuit Judge Schall participated only in the decision on the petition for panel rehearing.

The mandate of the court will be issued on February 7, 2018.

FOR THE COURT

January 31, 2018
Date

/s/ Peter R. Marksteiner
Peter R. Marksteiner
Clerk of Court

**United States Court of Appeals**
**for the Federal Circuit**

**JAMES L. KISOR,**
*Claimant-Appellant*

v.

**DAVID J. SHULKIN, SECRETARY**
**OF VETERANS AFFAIRS,**
*Respondent-Appellee*

2016-1929

Appeal from the United States Court of Appeals for Veterans Claims in No. 14-2811, Judge Alan G. Lance, Sr.

O'MALLEY, *Circuit Judge*, with whom NEWMAN and MOORE, *Circuit Judges*, join, dissenting from the denial of rehearing en banc.

The panel in this case held that the word "relevant" in 38 C.F.R. § 3.156(c)(1), a regulation promulgated by the Department of Veterans Affairs ("VA"), is ambiguous. *Kisor v. Shulkin*, 869 F.3d 1360, 1367 (Fed. Cir. 2017). Indeed, after granting that both parties had offered reasonable interpretations of the regulation, the panel held that the regulation is not just ambiguous on its face, but that the apparent ambiguity is insoluble by resort to standard interpretive principles. *Id.* at 1367–68. The panel, thus, turned to *Bowles v. Seminole Rock & Sand Co.*, 325

U.S. 410 (1945), and *Auer v. Robbins*, 519 U.S. 452 (1997), (collectively "*Auer*") to resolve the question presented. It concluded that the VA was entitled to deference for its interpretation of its own ambiguous regulation and, on that ground, unsurprisingly found in favor of the VA. 869 F.3d at 1368–69.

The panel predicated its decision on *Auer* deference, despite the Supreme Court's repeated reminder that statutes concerning veterans are to be construed liberally in favor of the veteran. *Henderson v. Shinseki*, 562 U.S. 428, 441 (2011); *Brown v. Gardner*, 513 U.S. 115, 117–18 (1994) (citation omitted). Whatever the logic behind continued adherence to the doctrine espoused in *Auer*—and I see little—there is no logic to its application to regulations promulgated pursuant to statutory schemes that are to be applied liberally for the very benefit of those regulated. When these two doctrines pull in different directions, it is *Auer* deference that must give way. I dissent from the court's refusal to take the opportunity to finally so hold.

Several justices of the Supreme Court recently have urged their colleagues to "abandon[] *Auer* and apply[] the [Administrative Procedure] Act as written." *Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1212–13 (2015); *see, e.g.*, *id.* at 1213–25 (Thomas, J., dissenting) (identifying several "serious constitutional questions lurking beneath" the doctrine of *Auer* deference); *id.* at 1210–11 (Alito, J., concurring in part and concurring in the judgment) (noting that Justices Scalia and Thomas have offered "substantial reasons why the *Seminole Rock* doctrine may be incorrect"); *see also Decker v. Nw. Envtl. Def. Ctr.*, 568 U.S. 597, 616 (2013) (Roberts, C.J., concurring) (recognizing that "[q]uestions of *Seminole Rock* and *Auer*

deference arise as a matter of course on a regular basis" and noting "some interest in reconsidering those cases"). *Auer* "encourag[es] agencies to write ambiguous regulations and interpret them later," which "defeats the purpose of delegation," "undermines the rule of law," and ultimately allows agencies to circumvent the notice-and-comment rulemaking process. Lisa Schultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 N.Y.U. L. REV. 461, 551–52 (2003); *see also Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 158 (2012) (acknowledging the "risk that agencies will promulgate vague and open-ended regulations that they can later interpret as they see fit, thereby frustrating the notice and predictability purposes of rulemaking" (internal quotation marks omitted)). And, on a structural level, by eliminating the separation between the entity that creates the law and the one that interprets it, *Auer* deference "leaves in place no independent interpretive check on lawmaking by an administrative agency." John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 COLUM. L. REV. 612, 639 (1996); *see also Decker*, 568 U.S. at 621 (Scalia, J., concurring in part and dissenting in part) ("*Auer* deference . . . contravenes one of the great rules of separation of powers: He who writes a law must not adjudge its violation."); *Egan v. Del. River Port Auth.*, 851 F.3d 263, 280 (3d Cir. 2017) (Jordan, J., concurring in the judgment) (critiquing the doctrine of *Auer* deference for its effect on the separation of powers).

This court has no authority to reconsider *Auer*, of course. But, leaving aside the continued vitality of *Auer* as a general proposition, granting *Auer* deference to the VA's interpretation of its own ambiguous

regulations flies in the face of another line of Supreme Court precedent—the longstanding "canon that provisions for benefits to members of the Armed Services are to be construed in the beneficiaries' favor." *Henderson*, 562 U.S. at 441 (internal quotation marks omitted); *see Gardner*, 513 U.S. at 117–18 (citation omitted) (acknowledging the "rule that interpretive doubt is to be resolved in the veteran's favor"); *see also* Linda D. Jellum, *Heads I Win, Tails You Lose: Reconciling* Brown v. Gardner*'s Presumption that Interpretive Doubt Be Resolved in Veterans' Favor with* Chevron, 61 AM. U. L. REV. 59, 77 n.141 (2011) (noting that "Gardner's Presumption . . . conflicts with *Auer* deference"). In a case like this one, where the agency's interpretation of an ambiguous regulation and a more veteran-friendly interpretation are in conflict, it is unclear from our precedent which interpretation should control. *See* James D. Ridgway, *Toward a Less Adversarial Relationship Between* Chevron *and* Gardner, 9 U. MASS. L. REV. 388, 398–401 (2014) (discussing this court's avoidance of "the tension between the canons of veteran friendliness and agency deference").[1] I have long expressed skepticism about the applicability of *Auer* in this context. *See, e.g.*, *Johnson v. McDonald*, 762 F.3d 1362, 1366–68 (Fed. Cir. 2014) (O'Malley, J., concurring) (noting "that the validity of *Auer* defer-

[1] As the response to the petition for rehearing notes, we have "rejected the argument that the pro-veteran canon of construction overrides the deference due to the [VA's] reasonable interpretation of an ambiguous statute." *Guerra v. Shinseki*, 642 F.3d 1046, 1051 (Fed. Cir. 2011) (emphasis added) (citing *Sears v. Principi*, 349 F.3d 1326, 1331–32 (Fed. Cir. 2003)). Whatever the merits of that conclusion, we have yet to decide how to resolve a conflict between the pro-veteran canon and the VA's interpretation of its own ambiguous *regulations*.

ence is questionable, both generally and specifically as it relates to veterans' benefit cases"); *Hudgens v. McDonald*, 823 F.3d 630, 639 n.5 (Fed. Cir. 2016) (O'Malley, J.) ("In many cases, the tension between *Auer* and *Gardner* is difficult to resolve, since both seemingly direct courts to resolve ambiguities in a VA regulation but would, in many cases, counsel contrary outcomes."). But, we keep finding reasons not to address the tension between these doctrines.

If only one of these doctrines can prevail in a given case, the pro-veteran canon must overcome *Auer*. "*Auer* deference is warranted only when the language of the regulation is ambiguous." *Christensen v. Harris County*, 529 U.S. 576, 588 (2000). In interpreting a regulation—including when deciding whether the regulation is ambiguous—we apply the ordinary "rules of statutory construction." *Roberto v. Dep't of Navy*, 440 F.3d 1341, 1350 (Fed. Cir. 2006) (citation omitted); *see also United States v. Lachman*, 387 F.3d 42, 54 (1st Cir. 2004) ("[W]e look to agency interpretations only when the statute or regulation remains ambiguous after we have employed the traditional tools of construction."). The "rule that interpretive doubt is to be resolved in the veteran's favor," *Gardner*, 513 U.S. at 117–18, is one of those rules of statutory construction. A regulation cannot be so ambiguous as to require *Auer* deference if a pro-veteran interpretation of the regulation is possible.

As the Supreme Court has acknowledged, moreover, the "general rule" of *Auer* deference "does not apply in all cases," such as those where there are "strong reasons for withholding the deference that *Auer* generally requires." *Christopher*, 567 U.S. at 155. The "rule that interpretive doubt is to be resolved in the veteran's favor," *Gardner*, 513 U.S. at

117–18, provides just such a reason. Deferring to the VA's interpretation of a statute makes some sense because Congress has delegated to the VA the authority to "issue[] a reasonable gap-filling or ambiguity-resolving regulation." *Sears*, 349 F.3d at 1332. But, where the VA itself has "promulgate[d] [a] vague and open-ended regulation[] that [it] can later interpret as [it] see[s] fit"—to the detriment of veterans—no such deference can be warranted. *Christopher*, 567 U.S. at 158–59.

The D.C. Circuit has reached an analogous conclusion in the context of Indian law, where "[t]he governing canon of construction requires that 'statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit.'" *Cobell v. Norton*, 240 F.3d 1081, 1101 (D.C. Cir. 2001) (quoting *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985)). The *Cobell* court acknowledged that, under *Chevron, U.S.A. Inc. v. Nat. Res. Def. Council*, 467 U.S. 837 (1984), "ordinarily we defer to an agency's interpretations of ambiguous statutes entrusted to it for administration." *Cobell*, 240 F.3d at 1101. The court nevertheless found that "*Chevron* deference is not applicable" in the Indian law context. *Id.* It gave the agency's interpretation "'careful consideration,' but the normally-applicable deference was trumped by the requirement" to construe statutes liberally in favor of Indians. *Cobell v. Kempthorne* (*Cobell II*), 455 F.3d 301, 304 (D.C. Cir. 2006) (quoting *Cobell*, 240 F.3d at 1101). The D.C. Circuit has attributed its departure from the norm of *Chevron* deference to "the special strength of this canon." *Albuquerque Indian Rights v. Lujan*, 930 F.2d 49, 59 (D.C. Cir. 1991) (citing *Muscogee* (*Creek*) *Nation v. Hodel*, 851 F.2d 1439, 1445 n.8 (D.C. Cir. 1988)).

The veteran-friendly canon of construction, which originates in the Supreme Court's World War II–era expression of solicitude towards those who "drop their own affairs to take up the burdens of the nation," *Boone v. Lightner*, 319 U.S. 561, 575 (1943), carries comparable weight. Indeed, it is difficult to overstate the importance of the veteran-friendly approach to veterans' benefits statutes and their accompanying regulations. As we have recognized, "the veterans benefit system is designed to award 'entitlements to a special class of citizens, those who risked harm to serve and defend their country. This entire scheme is imbued with special beneficence from a grateful sovereign.'" *Barrett v. Principi*, 363 F.3d 1316, 1320 (Fed. Cir. 2014) (quoting *Bailey v. West*, 160 F.3d 1360, 1370 (Fed. Cir. 1998) (en banc) (Michel, J., concurring in the result)). That overarching motivation explains "the uniquely pro-claimant nature of the veterans compensation system," *Hensley v. West*, 212 F.3d 1255, 1262 (Fed. Cir. 2000), as well as why the Supreme Court has "long applied" the pro-veteran canon of interpretation to the statutory scheme. *Henderson*, 562 U.S. at 441. Granting *Auer* deference to VA regulations conflicts directly with the moral principles underlying the veterans benefit system.

The VA nevertheless urges us to deny *en banc* review because the petitioner did not raise this argument in his appeal. Resp. to Pet. for Rehearing at 11 (citing *Pentax Corp. v. Robison*, 135 F.3d 760, 762 (Fed. Cir. 1998)). The central focus of the parties' arguments was the interpretation of § 3.156(c)(1). It is hard to imagine how a party can waive the question of the correct legal standard to apply in deciding that question. *Cf. Winfield v. Dorethy*, 871 F.3d 555, 560 (7th Cir. 2017) ("[W]aiver does not apply to argu-

ments regarding the applicable standard of review."). I also note that, in determining whether the regulation is ambiguous, the panel expressly held that "canons of construction do not reveal its meaning." *Kisor*, 869 F.3d at 1367. The veteran-friendly canon should have fallen within that category.

Because the petition raises a significant question about our standard of review, waiver does not preclude us from addressing the question *en banc*. I note, moreover, that the absence of counsel at the early stages of veterans' appeals and the fact that, even where counsel appear, they often do so pro bono, will help assure that we will continue to find process-related excuses to avoid resolving this important question. And, as a result, veterans will continue to be prejudiced by resort to *Auer*. This case presents an ideal vehicle for us to consider the reach of *Auer* deference when it comes into conflict with the pro-veteran canon of construction. I respectfully dissent from the court's decision not to take this issue up now.